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Law Reports : Rolls Court

REPORTS

OF

CASES IN CHANCERY,

ARGUED AND DETERMINED

IN

THE ROLLS COURT

DURING THE TIME OF

LORD LANGDALE,

MASTER OF THE ROLLS.

BY BENJAMIN KEEN, ESQ.,

BARRISTER AT LAW.

VOL. I.

1836, 1837.—6 & 7 WILL. IV.

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1837.

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Lord COTTENHAM, *Lord Chancellor.*

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor.*

Sir JOHN CAMPBELL, *Attorney-General.*

Sir ROBERT MONSEY ROLFE, *Solicitor-General.*

CORRIGENDA.

Page 189. line 12. from top, for "a," read "no."
284. and 286. for "223*l.*" read "313*l.*"
311. line 6. from top, for "November," read "September."
320. for "Williams," read "Williamson."
325. in the marginal note, for "W. G." read "G. W."
405. line 4. from bottom, for "Defendant," read "Plaintiffs."
582. line 5. from top, for "unnecessary," read "necessary."

MEMORANDA.

On the 16th of *January* 1836, the Lords Commissioners resigned the Great Seal, which was thereupon delivered by his Majesty to Sir *Charles Christopher Pepys*, Master of the Rolls, who was shortly afterwards created a Peer by the style and title of Baron *Cottenham*, of *Cottenham*, in the county of *Cambridge*.

At the same time, *Henry Bickersteth* Esq., one of his Majesty's counsel, was appointed to the office of Master of the Rolls, vacant by the promotion of Sir *Charles Christopher Pepys*, and was shortly afterwards created a Peer, by the style and title of Baron *Langdale*, of *Langdale*, in the county of *Westmoreland*.

On the 19th of *January*, Sir *Charles Christopher Pepys*, and *Henry Bickersteth* Esq., were sworn into their respective offices of Lord Chancellor and Master of the Rolls in the Lord Chancellor's court at *Westminster*, and, on the same day, the Master of the Rolls took his seat in the Rolls Court at *Westminster*.

James Trower Esq., one of the Masters of the Court of Chancery, having died in the month of *April* 1836, *Nassau William Senior*, of *Lincoln's Inn*, Esq., barrister at law, was some time afterwards appointed by his Majesty, in pursuance of the provisions of the 3 & 4 *W.* 3. *c.* 94. *s.* 16., to succeed Mr. *Trower* in the office of Master.

In

In the vacation after *Hilary* term, *Francis Whitmarsh*, *Francis James Newman Rogers*, *Charles Purton Cooper*, and *Richard Budden Crowder*, Esqs., of *Lincoln's Inn*, *Biggs Andrews* and *John Jervis*, Esqs., of the *Middle Temple*, and *George Chilton* and *John Evans*, Esqs., of the *Inner Temple*, were appointed King's Counsel.

A

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

A

	Page
Appleyard, Carr *v.*	725
Armstrong, Tullett *v.*	429
Attorney-General *v.* Aspinall	513
——— *v.* Crook	121
——— *v.* Cullum	104
——— *v.* Fishmongers' Company	492
——— *v.* Grocers' Company	506
——— *v.* Corporation of Norwich	700
——— *v.* Smithies	289
——— *v.* Todd	803

B

Bailey *v.* Gundry	53
Baker *v.* Sutton	224
Barnard, The Earl of Glengal *v.*	769
Barnett *v.* Mole	645
Barrett, Fellows *v.*	119
Behrens *v.* Pauli	456
Belk *v.* Slack	238
Bell, Dowson *v.*	761
——, Tyler *v.*	826
Bennett *v.* Rees	405
Benson, Camden *v.*	671
Birchmore, Sawyer *v.*	391. 825
Blackburn, Hobson *v.*	273
Blackwell *v.* Bull	176
Blair, Doungsworth *v.*	795
Boddy *v.* Dawes	362
Booth *v.* Leycester	247. 579
Borrer, Shaw *v.*	579
Bowen, Meredith *v.*	270
Braithwaite *v.* Britain	206
Brierley *v.* Walmsley	141
Brown *v.* Brown	275
Bull, Blackwell *v.*	176
Bullin *v.* Fletcher	369. 600
Burlingham, Mann *v.*	235
Buxton *v.* Buxton	753

C

Calley, Steed *v.*	620
Camden *v.* Benson	671

	Page
Carden *v.* Manning	380
Carr *v.* Appleyard	725
Chalie *v.* Pickering	749
Charlesworth, Malcolm *v.*	63
Clark, Miles *v.*	92
Clarke, Groves *v.*	132
Clementson *v.* Gandy	309
Congreve, Douglas *v.*	410
Cook *v.* Hutchinson	42
Cookson *v.* Hancock	817
Cooper, Mountford *v.*	464
Coster *v.* Coster	199
Coultart, Peasnall *v.*	183
Coventry *v.* Coventry	758
Cox, Wood *v.*	317
Cradock, Whatton *v.*	267
Crook, Attorney-General *v.*	121
Crouch *v.* Hickin	385
Cullum, Attorney-General *v.*	104

D

Dawes, Boddy *v.*	362
De Tastet *v.* Le Tavernier	161
Dering, Thomas *v.*	729
Dodsley, Stocks *v.*	325
Douglas *v.* Congreve	410
Doungsworth *v.* Blair	795
Dowson *v.* Bell	761

E

Eccles, Radcliffe *v.*	130
Edgell, Turner *v.*	502
Edwardes, Rees *v.*	465
Ennismore, Lord, Wyndham *v.*	467
Evans *v.* Stokes	24

F

Fellows *v.* Barrett	119
Fishmongers' Company, Attorney-General *v.*	492
Fitzjohn, Gayler *v.*	469
Foakes, Vaughan *v.*	58
Foster *v.* Hargreaves	281
Fletcher, Bullin *v.*	369. 600

G

Gandy, Clementson *v.*	309
Gayler *v.* Fitzjohn	469
Giles *v.* Giles	685
Glengal, The Earl of, *v.* Barnard	769
Glyn *v.* Houston	329
Graves, Palmer *v.*	545
Grocers' Company, Attorney-General *v.*	506
Groves *v.* Clarke	132
Gundry, Bailey *v.*	53

H

Hancock, Cookson *v.*	817
Hargreaves, Foster *v.*	281
Hargreaves *v.* Rothwell	154
Harrison *v.* Harrison	765
Hatfield, Stanton *v.*	358
Hayes *v.* Hayes	97
Heardson *v.* Williamson	33
Hickin, Crouch *v.*	385
Hitchon, Turner *v.*	814
Hobson *v.* Blackburn	273
Holden, Stokes *v.*	145
Horwood, Simons *v.*	7
Houston, Glyn *v.*	329
Howard *v.* Rhodes	581
Howden, Lord, Simpson *v.*	583
Hughes, Paris *v.*	1
Hutchinson, Cook *v.*	42
Hutchinson *v.* Stephens	240. 659

J

Jenkins *v.* Portman	435
Jennings *v.* Simpson	404
Johnson *v.* Johnson	648

K

Page

Kay *v.* Marshall 190
King, Raffety *v.* 601
Knight, Miller *v.* 129

L

Lee *v.* Park 714
Lees, Rayson *v.* 14
Lennox, Lord George, Storey *v.* 341
Leycester, Booth *v.* 247. 579

M

Mackenzie, Neale *v.* 474
Malcolm v. Charlesworth 63
Mann *v.* Burlingham 235
Manning, Carden *v.* 380
Marr *v.* Williams 582
Marshall, Kay *v.* 190
Mellor *v.* Woods 16
Meredith *v.* Bowen 270
Metcalfe v. Metcalfe 74
Miles *v.* Clark 92
Miller *v.* Knight 129
Mole, Barnett *v.* 645
Moysey, Ripley *v.* 578
Mountford *v.* Cooper 464

N

Neale *v.* Neale 672
Neale *v.* Mackenzie 474
Norwich, Corporation of, Attorney-General *v.* 700
Nugent, Lord, Stewart *v.* 201

P

Palmer *v.* Graves 545
Paris *v.* Hughes 1

Page

Park, Lee *v.* 714
Pauli, Behrens *v.* 456
Paull, Verchild *v.* 87
Peasnall *v.* Coultart 183
Phillips, Smith *v.* 694
Pickering, Chalie *v.* 749
Portman, Jenkins *v.* 435
Poulden, Snow *v.* 186
Purr, Wheatley *v.* 551

R

Radcliffe *v.* Eccles 130
Radford *v.* Radford 486
Raffety *v.* King 601
Rayson *v.* Lees 14
Rees, Bennett *v.* 405
Rees *v.* Edwardes 465
Rhodes, Howard *v.* 581
Ripley *v.* Moysey 578
Rothwell, Hargreaves *v.* 154

S

Sawyer *v.* Birchmore 391. 825
Shaw *v.* Borrer 559
Simons *v.* Horwood 7
Simpson *v.* Lord Howden 583
Simpson, Jennings *v.* 404
Slack, Belk *v.* 238
Smith, White *v.* 381
Smith *v.* Phillips 694
Smithies, Attorney-General *v.* 289
Snow *v.* Poulden 186
Stanton *v.* Hatfield 358
Steed *v.* Calley 620
Stephens, Hutchinson *v.* 240. 659
Stewart *v.* Lord Nugent 201
Stocks *v.* Dodsley 325
Stokes, Evans *v.* 24
Stokes *v.* Holden 145

	Page
Storey *v.* Lord George Lennox	341
Sutton, Baker *v.*	224
Swinnerton, Tomlinson *v.*	9

T

Le Tavernier, De Tastet *v.*	161
Thomas *v.* Dering	729
Todd, Attorney-General *v.*	803
Tomlinson *v.* Swinnerton	9
Tullett *v.* Armstrong	429
Turner *v.* Edgell	502
——— *v.* Hitchon	814
Tyler *v.* Bell	826

V

	Page
Vaughan *v.* Foakes	58
Verchild *v.* Paull	87

W

Walmsley, Brierley *v.*	141
Wetherell *v.* Wilson	80
Whatton *v.* Cradock	267
Wheatley *v.* Purr	551
White *v.* Smith	381
Whitton, Exparte	297
Williams, Marr *v.*	582
Williamson, Heardson *v.*	33
Wilson, Wetherell *v.*	80
Wood *v.* Cox	317
Woods, Mellor *v.*	16
Wyndham *v.* Lord Ennismore	467

1837.

ORDER.

In Chancery.

23d *February* 1837.

Whereas it is expedient that the fees which are by the General Orders for regulating the Practice of the Court of Chancery, bearing date the 21st day of *December* 1833, directed to be taken by the Masters and their Clerks, and the Registrars and their Clerks, under the act passed in the third and fourth years of the reign of his present Majesty, intituled, "An Act for the Regulation of the Proceedings and Practice of certain Offices of the High Court of Chancery in *England*," should be varied and increased, or reduced in amount, or wholly omitted to be received, as hereinafter mentioned; Now I, the Right Honourable *Charles Christopher* Baron *Cottenham*, Lord High Chancellor of *Great Britain*, with the advice and concurrence of the Right Honourable *Henry* Baron *Langdale*, Master of the Rolls, and the Right Honourable Sir *Lancelot Shadwell*, Knight, Vice-Chancellor of *England*, do hereby order and direct that, from and after the 27th day of *February* instant, the Fees set forth in the First Schedule hereunto shall be the fees to be received and taken by the Clerks to the Masters in Ordinary, in the place and stead of the fees now received and taken by them, pursuant to the said General Orders, bearing date the 21st day of *December* 1833; And that the Fees set forth in the Second Schedule hereunto shall be the fees to be received and taken by the Registrars and their Clerks, in the place and stead of the fees now received and taken by them, pursuant to the said General Orders.

FIRST SCHEDULE.

Fees to be received and taken by the Clerks to the Masters in Ordinary.

	£	s.	d.
For every warrant - - -	0	3	0
For drawing every report, exclusive of schedules of accounts of parties accounting before the Master, and exclusive of the fee on signing, per folio - -	0	1	0
For drawing schedules of accounts of parties accounting before the Master, per folio -	0	0	6
On signing every report and certificate -	1	0	0
For investigating every title brought in before the Master to be settled and perusing the abstract thereof, upon the first twenty-five folios thereof - - -	0	6	8
And upon every succeeding twenty-five folios thereof - - - -	0	3	4
For every advertisement issued by the Master	1	1	0
Upon every peremptory advertisement for the sale of property with the approbation of the Master, in addition to the foregoing fee, to be repaid, if the property shall not be offered for sale - - -	3	0	0
(In addition to the reasonable travelling expences of the Master's Clerk, to be received and retained by him.)			
For signing the allowance of every deed, recognizance, set of interrogatories, account, or other document allowed and signed by the Master - - - -	0	5	0

For

	£	s.	d.
For every order upon a warrant - -	0	5	0
For perusing and settling the draft of every deed brought before the Master to be settled (except lease for a year), where such deed shall not exceed thirty folios -	1	0	0
Where such deed shall exceed thirty folios and not exceed fifty folios - -	1	10	0
And where such deed shall exceed fifty folios, and not exceed 100 folios - -	2	10	0
And where such deed shall exceed 100 folios	3	0	0
Fee on preparing every recognizance -	1	1	0
For taking the acknowledgment of any deed	0	6	0
For taking the acknowledgment of every married woman, or such other fee as the Court of Common Pleas at *Westminster* shall order to be paid for taking such acknowledgment - - -	1	6	8
For an examination fee on each witness, exclusive of oath - - -	0	5	0
For examining the engrossments of deeds, each skin - - - -	0	3	4
For comparing deeds, books, and papers with the schedule on their being deposited or delivered out, where the schedule shall not amount to fifty folios - - -	0	6	8
Where the schedule shall amount to fifty folios - - - - -	0	13	4
For attending any court per day by the clerk	0	13	4
For searching papers in a cause or matter not in immediate progress before the Master - - - -	0	6	8
For every oath - - - -	0	1	6
For entering accounts of receivers, consignees, and committees, per folio in each book - - - - -	0	0	6

1837.

1837.

	£	s.	d
For entering accounts of parties accounting before the Master in a book, if required, per folio - - - -	0	0	6
For every exhibit - - -	0	2	6
Where a Master shall be required to attend a party to administer an oath, there shall be paid a further fee of ten shillings over and besides the coach-hire, or reasonable travelling expenses of the Master -	0	10	0
For expunging scandal or impertinence out of every record or document referred on every such record or document - -	1	0	0

SECOND SCHEDULE.

Fees to be received and taken by the Registrars and their Clerks.

	£	s.	d.
For every decree or order on the original hearing of a cause, and on further directions, exclusive of the Master of the Rolls' fees on decrees of 6*s.* 8*d.* - - -	3	10	0
For every office copy thereof - -	2	0	0
For every order on petition or motion of course, not exceeding one side - -	0	3	0
For every additional side of such order -	0	1	0
For every order on other petitions where a reference is directed, but the decision of the Master is not to be final, and also where the petition is dismissed - -	0	10	0
For every office copy thereof - -	0	10	0
For every order for a special injunction, or for the appointment of a receiver -	2	10	0
For every office copy thereof - -	0	10	0
For every order for payment of money out of Court, and for no other purpose, where the sum or sums thereby specifically directed to be paid shall not exceed in the whole 100*l.* - - - -	0	10	0
For every office copy thereof - -	0	5	0
For every order for transfer out of Court, or sale, of any sum or sums of Government stock, or South Sea Annuities (excepting Long Annuities and annuities for terms of years) and for no other purpose, where			

the

1837.

	£	s.	d.
the sum or sums thereby specifically directed to be transferred or sold shall not exceed in the whole 100*l.* stock or annuities - - - -	0	10	0
For every office copy thereof - -	0	5	0
For every order for payment out of Court of any annuity or annuities, not exceeding in the whole 5*l.* per annum, or if any interest or dividends upon stock or annuities, not exceeding in the whole 5*l.* per annum, and for no other purpose - -	0	10	0
For every office copy thereof - -	0	5	0
For every other order for payment or transfer out of Court - - -	2	10	0
For every office copy thereof - -	1	0	0
For every other order on special motions -	1	0	0
For every office copy thereof - -	0	10	0
For every order on arguing exceptions -	2	0	0
For every office copy thereof - -	1	0	0
For every order on arguing pleas and demurrers - - - -	1	0	0
For every office copy thereof - -	0	10	0
For every order on petition of appeal or rehearing - - - -	2	0	0
For every office copy thereof - -	1	0	0
For every order on petitions not herein otherwise specified - - -	2	0	0
For every office copy thereof - -	1	0	0
For every order in any matter in Lunacy -	0	10	0
For every office copy thereof - -	0	5	0
For every order in any matter in Bankruptcy	0	10	0
For every office copy thereof - -	0	5	0
For every copy of a petition of appeal or rehearing, per side - - -	0	0	6
For every certificate signed by the Registrar			

for

	£	s.	d.
for the sale or transfer of annuities, stock, or Exchequer bills, or for delivery out of the latter - - - -	0	2	6
For every other certificate signed by the Registrar - - - -	0	1	0
For every copy of minutes of any decree or order, per side - - - -	0	1	0
For every exhibit proved *vivâ voce* in court	0	2	6
For entering every plea of demurrer -	0	1	0
For setting down causes, exceptions, further directions, pleas, and demurrers, each (except for setting down causes on the Registrar's days) - - - -	0	1	0
For setting down causes on the Registrar's days, each - - - -	1	1	0

1837.

COTTENHAM, C.
LANGDALE, M.R.
LANCELOT SHADWELL, V.C.

COURT OF CHANCERY.

5th *May*, 1837.

The Right Honourable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following; that is to say,—

I. THAT, from and after the 20th day of *May* now instant, every original information or bill of complaint filed in the High Court of Chancery, shall (at the option of the party, informant or complainant, by or on whose behalf the information or bill shall be filed) be distinctly marked at or near the top or upper part thereof, either with the words "Lord Chancellor," or with the words "Master of the Rolls:" and that the Six Clerks and Clerk in Court, to whom the filing of the information or bill belongs, shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry, whether the information or bill is marked with the words "Lord Chancellor," or with the words "Master of the Rolls;" and that, from and after the said 20th day of *May*, the Six Clerks and Clerks in Court are not to file any original information or bill of complaint which shall not be marked in the manner hereinbefore directed.

1837.

II. That, in every cause in which the original information or bill shall be marked with the words "Lord Chancellor," or with the words "Master of the Rolls," the Six Clerk to whom it belongs to give or sign the certificate that the cause is ready for hearing shall, upon being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the words "Lord Chancellor," or with the words "Master of the Rolls," in conformity with the like words marked on the original information or bill.

III. That, in every cause now in Court, but which has not yet been set down for hearing, the Clerk in Court who, on the behalf of the informant, or of the Plaintiff or Defendant, shall, at any time after the 20th day of *May* instant, apply to the Six Clerk to set down the cause for hearing, or for the certificate that the cause is ready for hearing, shall state or certify to such Six Clerk whether any orders or order disposing of any pleas or plea, demurrers or demurrer, or any special orders or order upon merits shewn by answer or by affidavit, have or has been made in the cause, or (in case no such order as aforesaid has been made) whether the party on whose behalf the application is made desires the cause to be heard before the Lord Chancellor or the Master of the Rolls; and in case the Clerk in Court so applying shall certify that any such order as aforesaid has been made by the Lord Chancellor or Vice-Chancellor, and not by the Master of the Rolls, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Lord Chancellor or Vice-Chancellor, or (in case no such order has been made in the cause) that the party desires the cause to be heard before

before the Lord Chancellor, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Lord Chancellor;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Lord Chancellor; and in case the Clerk in Court so applying as aforesaid shall certify that any such order as aforesaid has been made by the Master of the Rolls, and not by the Lord Chancellor or Vice-Chancellor, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Master of the Rolls, or (in case no such order as aforesaid has been made in the cause) that the party desires the cause to be heard before the Master of the Rolls, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Master of the Rolls;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Master of the Rolls. 1837.

IV. That the Registrars of the Court, and the Secretaries of the Lord Chancellor and of the Master of the Rolls, are not at any time after the said 20th day of *May* instant to set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner directed by the second and third Orders, and are not, after the date of these Orders, to set down to be heard before the Master of the Rolls any cause, further directions, or exceptions, which is or are now set down to be heard before the

1837. Lord Chancellor, and are not, without special order of the Lord Chancellor, to set down to be heard before the Lord Chancellor any cause, further directions, or exceptions, which is or are now set down to be heard before the Master of the Rolls.

V. That in every petition praying that a day may be appointed for arguing a plea or demurrer put in to any information or bill filed on or after the said 20th day of *May*, it shall be stated whether the information or bill to which such plea or demurrer is put in is marked with the words "Lord Chancellor," or with the words "Master of the Rolls."

VI. That, from and after the said 20th day of *May* instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Lord Chancellor, and shall not, without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Lord Chancellor," or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Lord Chancellor.

2. Every cause in which the certificate of the cause being ready for hearing shall be marked with the words "Lord Chancellor."

3. Every cause requiring to be heard for further directions, or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a court of common law has been or shall be obtained in pursuance of a decree or order pronounced by the Lord Chancellor or Vice-Chancellor.

4. Every

4. Every exception or set of exceptions taken to any report made by a Master in ordinary, in pursuance of a decree, or an order of reference, (not being an order obtained as of course,) made by the Lord Chancellor or the Vice-Chancellor. 1837.

VII. That, from and after the said 20th day of *May* instant, every petition presented or motion made under or pursuant to the liberty to apply contained in any decree or decretal order of the Lord Chancellor or Vice-Chancellor, shall, as to petitions, be addressed to and set down to be heard before the Lord Chancellor, and shall as to motions be made before the Lord Chancellor or Vice-Chancellor; and that no such petition or motion shall, without special order of the Lord Chancellor, be addressed to or made before the Master of the Rolls.

VIII. That all such pleas, demurrers, causes, further directions, exceptions, and petitions, to be so set down to be heard before the Lord Chancellor, as hereinbefore is directed, shall be heard and determined in the same manner, and be subject to the same rules, as pleas, demurrers, causes, further directions, exceptions, and petitions set down before the Lord Chancellor, have heretofore been heard and determined.

IX. That, from and after the said 20th day of *May* instant, all interlocutory applications by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Lord Chancellor or to the Vice-Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls; viz. in the several cases following: —

1. Where

1837.

1. Where the original information or bill is marked with the words "Lord Chancellor."

2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or any special order upon merits, shewn by answer or by affidavit, has been made in the cause by the Lord Chancellor or Vice-Chancellor, and no such order has been made by the Master of the Rolls.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers or special orders upon merits, shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders was made by the Lord Chancellor or Vice-Chancellor.

4. Where the cause has been set down for hearing before the Lord Chancellor, either for original hearing or for further directions, or on the equity reserved.

5. Where the decree or last decretal order was made by the Lord Chancellor or Vice-Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a rehearing of a decree or decretal order made by the Master of the Rolls.

X. That, from and after the said 20th day of *May* instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Master of the Rolls, and shall not otherwise than for the purpose of rehearing be set down to be heard before the Lord Chancellor.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Master of the Rolls;" or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Master of the Rolls.

2. Every

1837.

2. Every cause in which the certificate of the same being ready for hearing shall be marked with the words "Master of the Rolls."

3. Every cause requiring to be heard for further directions or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a Court of Common Law has been or shall be obtained, in pursuance of a decree or order pronounced by the Master of the Rolls.

4. Every exception, or set of exceptions, taken to any report made by a Master in ordinary, pursuant to a decree or an order of reference (not being an order obtained as of course) made by the Master of the Rolls.

XI. That, from and after the said 20th day of *May* instant, every petition presented, or motion made, under or pursuant to the liberty to apply contained in any decree or decretal order of the Master of the Rolls, shall be addressed to and set down to be heard, or shall be made, before the Master of the Rolls: and that, except for the purpose of rehearing an order of the Master of the Rolls, no such petition or motion shall be addressed to or made before the Lord Chancellor.

XII. That, from and after the said 20th day of *May* instant, all interlocutory applications, by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of rehearing an order of the Master of the Rolls, be made to the Lord Chancellor; viz. in the several cases following: —

1. Where the original information or bill is marked with the words "Master of the Rolls."

2. Where

1837.

2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer, or any special order upon merits shewn by answer or affidavit, has been made in the cause by the Master of the Rolls, and no such order has been made by the Lord Chancellor or Vice-Chancellor.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special order upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders has been made by the Master of the Rolls.

4. Where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the equity reserved, and is not now set down to be so heard before the Lord Chancellor.

5. Where the decree or last decretal order was made by the Master of the Rolls or by the Lord Chancellor, on the re-hearing of a decree or decretal order of the Master of the Rolls.

XIII. That the above Orders as to interlocutory applications shall not extend to any applications for orders of course, nor to any petitions presented, or notices of motion given, before the 18th day of *May* instant.

XIV. That all applications for orders of course to be obtained on petition or motion shall and may be made in the same manner in all respects as if the above orders had not been made; but as to all cases in which, according to the 9th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Lord Chancellor or Vice-Chancellor, if any order *nisi*, upon which cause against

against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Master of the Rolls, such cause shall be shewn before the Lord Chancellor or Vice-Chancellor; and if any order of reference to the Master in ordinary shall be obtained as of course from the Master of the Rolls, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or the Vice-Chancellor; and in all cases in which, according to the 12th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Master of the Rolls, if any order *nisi*, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, such cause shall be shewn before the Master of the Rolls; and if any order of reference to the Master in ordinary shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls. 1837.

XV. That, in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court in the same manner as if these Orders had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-Chancellor, shall, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made pursuant to the directions contained in these Orders, be marked as having

1837. been made for such Judge, and shall in the future proceedings of the cause be deemed to be the order of such Judge in all respects save this, — that no order so made by one Judge for another under the circumstances aforesaid shall be reheard for the purpose of being discharged or varied otherwise than by the Lord Chancellor.

XVI. That, from and after the said 20th day of *May* instant, all matters which under and by virtue of any Act of Parliament or otherwise the Court hath jurisdiction to hear and determine in a summary way, and which shall be in the first instance brought under the consideration of the Court upon a petition presented to the Lord Chancellor, shall in any subsequent stage of the proceedings respecting the same matters be heard and determined by the Lord Chancellor or Vice-Chancellor; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls; and that all such matters as aforesaid which shall be in the first instance brought under the consideration of the Court upon a petition to the Master of the Rolls, shall, in any subsequent stage of the proceedings respecting the same matters, be heard and determined by the Master of the Rolls; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, otherwise than for the purpose of rehearing an order of the Master of the Rolls, be set down to be heard before the Lord Chancellor.

COTTENHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.

REPORTS

OF

CASES

ARGUED AND DETERMINED 1836.

IN

THE ROLLS COURT.

PARIS *v.* HUGHES.

1836.
Jan. 21. 29.

MR. *PEMBERTON* moved that an order which had been obtained, as of course, by the Defendant *Brightmore* for examining the co-defendant *Hughes* might be discharged. The bill was filed for the purpose of setting aside a conveyance under a power of sale, alleged to have been fraudulently made by the Defendant *Hughes* to the Defendant *Brightmore*. By the decree at the hearing, it was referred to the Master to inquire whether the Defendant *Brightmore* at the time of his purchase had notice that the Plaintiff intended to dispute the validity of the deed, and, since the decree, *Brightmore* had obtained the order now sought to be discharged. Lord *Eldon* had, in several cases, expressed his opinion that a motion for an order to examine a co-

An order to examine a co-defendant as a witness, may be obtained *ex parte* by a Defendant, as well after as before decree.

The Court gives credit to the allegation upon which the order is founded, that the Defendant proposed to be examined is not interested; and the question whether he is or is not interested can only be raised, when the deposition of the witness is objected to.

1836.
PARIS
v.
HUGHES.

a co-defendant was not a motion of course after decree. In Mr. *Seton's Forms of Decrees* (*a*), it is said that "an order to examine a co-defendant is not of course after a replication, nor *à fortiori* after a decree." (*b*) In *Simmons* v. *Gutteridge*, where leave was given to legatees, after the decree, to examine their co-defendant, the executor, the motion was made upon notice. In *Franklyn* v. *Colquhoun* (*c*), Lord *Eldon* says he had always thought a motion to examine a co-defendant was not of course after a decree, though a special ground might be laid; and in *Purcell* v. *M'Namara* (*d*), a similar motion was considered not to be of course. In *Hurd* v. *Partington* (*e*), a recent case before Lord *Lyndhurst*, the assignees of a bankrupt obtained, after decree, an order as of course to examine the bankrupt, a co-defendant, and actually examined him under that order; but, finding that the order was irregular, and that they could consequently make no use of his deposition, they obtained another order for the same purpose upon a special application. In the present case there was, besides the objection in point of form, a substantial objection to the order, for the Defendant *Hughes*, who was proposed to be examined, was manifestly interested in the cause. An order for the examination of one Defendant by another proceeded upon the suggestion that the party proposed to be examined was not interested, and was irregular if that suggestion were untrue; *Seton on Decrees* (*g*), *Anon.* (*h*)

Mr. *Barber*, *contrà*, contended that a motion for an order to examine a co-defendant was as much of course after as before a decree. That point had been determined

(*a*) page 20.
(*b*) 13 *Ves.* 262.
(*c*) 16 *Ves.* 218.
(*d*) 17 *Ves.* 434.
(*e*) *Younge*, 307.
(*g*) page 20.
(*h*) 18 *Ves.* 517.

1836.

PARIS v. HUGHES.

mined in a recent case before Sir *John Leach*, *Van* v. *Corpe*, referred to in *Smith's Practice* (*a*), after a minute inquiry into the practice. Lord *Eldon*'s observation in *Franklyn* v. *Colquhoun* was a mere *dictum*, not supported by the practice; and the decision in that case was conformable with the practice. *Purcell* v. *M'Namara* had no application, because in that case the co-defendant had already been examined, and a motion for his re-examination was necessarily a special application. As to the supposed necessity of shewing, upon motion, the truth of the allegation that the Defendant was not interested in the matters to which it was proposed to examine him, that was expressly declared by Lord *Eldon* in *Murray* v. *Shadwell* (*b*) to be unnecessary; and in *Lee* v. *Atkinson* (*c*), Lord *Thurlow* said that, although orders for examining a co-defendant were usually drawn upon a suggestion that the party had no interest, yet that was not considered as essential to obtaining the order; and the question how far the party was a competent witness must be raised, when the deposition was offered to be read in evidence.

Mr. *Pemberton*, in reply.

The MASTER *of the* ROLLS.

Jan. 29.

This was a motion made by the Plaintiff to discharge an order obtained *ex parte* by the Defendant to examine a co-defendant as a witness after the decree. It was contended, in support of the motion, that though an order to examine a co-defendant as a witness was a motion of course before the decree, it must be made upon notice after the decree; and a passage from Mr. *Seton*'s book on *Decrees*, and several cases were cited in support of that pro-

(*a*) Vol. ii. p. 134. and now reported in 3 *Mylne & Keen*, 269.

(*b*) 2 *V. & B.* 401.

(*c*) 1 *Cox*. 413.

1836.
PARIS
v.
HUGHES.

proposition. On the other hand it was argued, that in none of the cases cited had there been any decision upon the point, and that the point had been expressly determined in a late case of *Van* v. *Corpe* before Sir *John Leach.*

The cases, cited in support of the motion, were *Simmons* v. *Gutteridge*, which does not distinctly involve the point in question; *Purcell* v. *M'Namara*, where the Defendant sought to be examined as a witness after the decree had been previously examined, and, consequently, could not be again examined, except upon a special motion; and *Franklyn* v. *Colquhoun*, an application similar to the present, which was refused by Lord *Eldon* on the ground that the Plaintiff had acquiesced for two years in the order obtained *ex parte* by the Defendant, though he takes occasion to observe that he had always thought this was not a motion of course after a decree. *Hurd* v. *Partington*, a case before Lord *Lyndhurst*, reported by Mr. *Younge*, was also cited. In *Van* v. *Corpe*, with a note of which case I have been furnished, it appears that *Franklyn* v. *Colquhoun* was cited in the argument before Sir *John Leach*, and the *dictum* of Lord *Eldon* in that case, no doubt, induced him to hesitate in his decision, and to make a full inquiry before he determined the point. He applied to the registrars, to the most experienced clerks in court, and to his own secretaries; and I have been furnished with the certificates produced on that occasion.

His Lordship proceeded to read the several certificates. (*a*)

Upon

(*a*) The certificates were as follows:—

In obedience to the Master of the Rolls' request, the registrars beg to state that liberty for one Defendant to examine a co-defendant, after a decree, as a witness for him before the Master has

1836.

PARIS v. HUGHES.

Upon this evidence I consider it as the settled practice of the Court that an order of this kind may be obtained *ex parte* as well after as before decree.

Another

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has always been treated as a motion of course without notice, upon the allegation that he is in no way concerned in point of interest in the matter to which he is to be examined, and saving all just exceptions. The registrars are the more confirmed in this opinion, inasmuch as precedents have been found as far back as 1796, and the only case in which such an order has been discharged is that of *Messenger* v. *Young*, 11th of *April* 1811, which omitted to state that the co-defendant was not concerned in point of interest, and on that ground only was discharged by Lord *Eldon*.

Registrar's Office, *May* 9. 1834.

F. B. BEDWELL.
J. C. FRY.
E. D. COLVILLE.
J. COLLIS.
R. O. WALKER.
H. E. BICKNELL.

We, the undersigned sworn clerks of the Court of Chancery, respectfully certify that, according to the practice of this Court, an order for one Defendant to examine a co-defendant, having no interest in the matters to which he is to be examined as a witness before the Master, is an order of course, saving all just exceptions as well after as before decree in the cause.

OSWALD MILNE.
JOSEPH EDWARD KENSIT.
GEORGE PAPPS.
JOHN POWNALL.
GEORGE JACKSON.
JOHN BAINES.
RICHARD MILLS.
SAMPSON SANDYS.
JAMES THOMAS HORNE.
JOHN WAINEWRIGHT.

We humbly certify that it has been the constant practice of this office to make orders of course on petitions presented by one Defendant for liberty to examine a co-defendant upon interrogatories before the Master after decree, and we are not aware of any such orders having been impeached for irregularity. This practice is laid down in Mr. *Deave's Manuscript Book*, which was presented to the secretary's office by the late lord *Alvanley* for the purpose of reference in any matters of difficulty. It has frequently been referred to as a work of considerable authority by Lord *Eldon*, and by many Masters of the Rolls, on points of practice. The following is an extract from this

1836.

PARIS *v.* HUGHES.

Another point was raised as to the allegation, upon which the order is founded, that the Defendant proposed to be examined is not interested. I find that the usual course is to allege generally that the Defendant is not interested, and in some cases that he has no interest in the matters to which it is proposed to examine him, that the Court gives credit to the party who applies for the order, and that the objection, if any, must be taken when the deposition of the witness is offered in evidence. In *Murray* v. *Shadwell* Lord *Eldon* came to the conclusion that a Defendant might be examined, if not interested in the matters to which it was proposed to examine him, whether the allegation on which the order was founded were general or limited to those matters; and that the question, whether the party was interested or not, was to be determined when the objection was taken to the deposition of the witness.

Considering the *dictum* of Lord *Eldon* in *Franklyn* v. *Colquhoun*, I should have felt some difficulty as to the costs in this case, had it not been for the decision of the late Master of the Rolls in *Van* v. *Corpe*. But, as that precedent establishes the practice of the Court, the motion must be refused with costs.

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this book on the point in question: —

"After hearing, either party prays for liberty to examine a Defendant before the Master as a witness, saving just exceptions, as in *Wright* v. *Mawson*, 4 *June* 1739. Petition of Defendant *Mawson* that Defendant *Mac Culloch* may be examined upon interrogatories before the Master as a witness for and on behalf of the petitioner in this cause. Answer, — Be it so, saving all just exceptions, hereof, &c. So in *Harding* v. *Gibson*, 26th *May* 1744; *Ashton* v. *Dawson*, 16th *June* 1744."

Had any alteration taken place in the practice as above stated, it would have been noticed in Mr. *Deave*'s book.

9th *May* 1834.

THOMAS LEACH.
JAMES A. MURRAY.
Secretaries to the Master of the Rolls.

1836.

SIMONS *v.* HORWOOD.

Jan. 27.

A testator gave a legacy to a trustee in trust to invest it for the benefit of *E. S.*, independent of the control of her husband. On a bill by the husband and wife against the trustee, to have it declared that the wife was absolutely entitled to the fund, and to have the same transferred to her or to her husband by her direction or in her right, it was held, that the wife was entitled to the entire disposal of the fund, but that the husband could not obtain it in that suit, and it was referred to the Master to approve of a trustee, to whom the fund might be transferred upon the trust declared in the will, and to approve of a deed declaring that trust.

THOMAS RUSSELL, by his will, gave and bequeathed to his cousin, *Edward Horwood*, the sum of 11,000*l.* in the 4 per cent. bank annuities in trust to be by him equally divided among the eleven children of his first cousins, *John*, *William*, and *Richard Horwood*, except *Sarah*, the wife of *John Simons*, and *Elizabeth*, the wife of *Charles Harland*, whose shares the said *Edward Horwood* should invest for their benefit independent of the control of their respective husbands; and the testator appointed *Edward Horwood* and *Hugh Morgan* executors of his will.

The will was proved by the executors shortly after the death of the testator, and the sum of 11,000*l.* 4 per cent. bank annuities was transferred by the executors into the name of *Horwood*, who was alone named as the trustee of that fund. The shares had been paid by *Horwood* to all the legatees, except *Sarah Simons* and *Elizabeth Harland*. The bill was filed by *John Simons* and *Sarah* his wife against *Edward Horwood*; and it prayed that *Sarah Simons* might be declared to be absolutely entitled to her share of the legacy, and that the same might be transferred or paid to her, or to the Plaintiff *John Simons* by her direction or in her right, and that the Defendant might be decreed to transfer and pay the same accordingly; or otherwise that it might be referred to the Master to approve of a proper settlement of the same for the benefit of the Plaintiff *Sarah Simons* for her separate use, but so as to give her an absolute power of disposition over the same.

Mr.

1836.

SIMONS v. HORWOOD.

Mr. *Girdlestone*, jun., for the Plaintiffs.

A gift of a sum of money to trustees in trust to pay the produce to *A.* to her separate use, independent of her husband without any limitation as to the duration of *A.*'s interest has been held to be an absolute gift of the principal; *Elton* v. *Shephard.* (*a*) In *Irwin* v. *Farrer* (*b*), where a legacy was given to trustees in trust to invest the same and pay the dividends to *A.* for life, and after her decease the principal according to her appointment by will or otherwise, the Court held that the legatee had an absolute power of disposal over the fund; and that the demand by the bill was a sufficient indication of her intention to take the whole for her own benefit, and a decree was made accordingly. So where a testator bequeathed to a woman a fund with the interest thereon to be vested in trustees, the income arising therefrom to be for her separate use, the Court held that the legatee took an absolute interest in the fund: *Adamson* v. *Armitage.* (*c*)

In the present case there is an express gift of the fund in trust to divide it among the eleven persons of whom the Plaintiff is one, and the Plaintiff's share is given to her separate use. There is no limitation of a life-interest, nor is there any gift over; and if the Court were to direct a settlement, that settlement must give to Mrs. *Simons* a general power of appointment, which power she might immediately exercise in favour of her husband. It seems clear, therefore, that the Plaintiff, Mrs. *Simons*, is entitled to a declaration that she is absolutely entitled to her share of the legacy, and to have an immediate assignment of it made to her or to such person as she shall direct by the trustee.

Mr.

(*a*) 1 *Bro. C. C.* 532.
(*b*) 19 *Ves.* 86.
(*c*) 19 *Ves.* 416. S. C. *Coop.* 283.

1836.

SIMONS v. HORWOOD.

Mr. *Lovat*, for the trustee, submitted that the decree in this case ought to refer it to the Master to approve of a proper settlement, having regard to the direction of the testator in the will as to this particular legacy. The trustee under the will was ready to act as the Court should direct.

The MASTER *of the* ROLLS.

This is the husband's suit, and the wife, for all the purposes of this suit, must be taken to be entirely under the influence of the husband. What the testator has done, and all that he has done, is to direct that Mrs. *Simons*'s share of the legacy should be invested by the trustee for her benefit, independent of the control of her husband. There is no limitation whatever in the will, and the wife is entitled to have the entire disposal of this fund, but in a manner free from the control of the husband. The husband, therefore, cannot obtain it in this suit. Let it be referred to the Master to approve of a trustee to whom the fund may be transferred upon the trust declared in the will, and let the Master approve of a short deed declaring that trust.

TOMLINSON *v.* SWINNERTON.

Feb. 9. 15.

A Defendant cannot file a demurrer to part of the bill, and an answer to the remainder upon a common *dedimus*, but must sue out a special *dedimus* for that purpose.

THIS was a motion to expunge or over-rule the demurrer, or to take the demurrer and answer of the Defendants off the file for irregularity. The Defendants appeared to the bill on the 14th of *August* 1835, and on the 1st of *October* following they obtained a common

1836.

TOMLINSON v. SWINNERTON.

a common *dedimus* returnable without delay, which, according to the practice of the Court, was on the first day of the following *Michaelmas* term. The commissioners took in fact a demurrer and answer from the Defendants, but in the caption they stated that they had taken an answer only without taking any notice of the demurrer. On the 11th of *November* following, the Defendants filed their joint and several demurrer and answer to the bill.

In support of the motion, it was said that, upon an ordinary *dedimus*, the commissioners had power to take and return nothing but an answer only, and that a demurrer and answer required a special *dedimus*; *Wyatt's Practical Register* (*a*), *Harrison's Practice* (*b*), *Turner and Venables' Practice.* (*c*) There were several cases which, though they did not apply expressly to the point in question, went to confirm the proposition laid down in the books of practice, and to shew that the proceeding of the Defendants was irregular. In *Taylor* v. *Milner* (*d*) the defendant, having applied for and obtained an order for time to answer, put in an answer and demurrer, and the demurrer was, upon motion, ordered to be expunged or over-ruled. In *Mann* v. *King* (*e*), the defendant having had an order for a month's time to plead, answer, or demur, not demurring alone, and a subsequent peremptory order for three weeks' time to answer, filed a demurrer and answer. The plaintiff moved that the demurrer and answer might be taken off the file, and the Lord Chancellor made the order. *Penn* v. *Lord Baltimore* (*g*), and *Kenrick* v. *Clayton* (*h*), were also authorities to shew that after

(*a*) page 114.
(*b*) page 167. *Newland*'s edition.
(*c*) Vol. i. p. 542.
(*d*) 10 *Ves.* 444.
(*e*) 18 *Ves.* 297.
(*g*) 1 *Dick.* 273.
(*h*) 2 *Bro. C. C.* 214.

after an order for time to answer, a demurrer, though coupled with an answer, would not be allowed. The same rule applied to a plea which could not be taken upon a general commission to take the answer only; *Lloyd* v. *Gunter*. (*a*) The ground upon which a party, who had obtained an order for time to answer, was not allowed to demur, was that by obtaining the order he had undertaken to the Court to answer only; and by parity of reason, a defendant who had sued out a common *dedimus*, which was an authority to the commissioners to take an answer only, had undertaken to follow that authority, and could not be allowed to demur. The misrepresentation in the caption of the commissioners, the statement made in their return being contrary to the fact, and appearing to be erroneous by the very title of the Defendants' demurrer and answer, was of itself a sufficient ground for the present application.

On the other side it was contended, that, whatever *dicta* might be found in some of the books of practice, the rule which actually prevailed was, that where a party, not being in contempt, and not taking any order for time, proposed to demur and answer, the course was to take out a common *dedimus*. The Defendant, before taking out the *dedimus* in this case, had applied at the Six Clerks' Office, and had been advised that the common *dedimus* was applicable to his case. The cases cited on the other side proved nothing inconsistent with this practice, for in all of them except *Lloyd* v. *Gunter*, the defendant had obtained an order for time, and in *Lloyd* v. *Gunter* the defendant was in contempt, for the plea came in after a proclamation returned. As to the form of the caption, a demurrer not being taken upon oath, the commissioners were not bound to take any notice of it in their return.

Mr.

(*a*) 1 *Vern.* 275.

1836.

TOMLINSON *v.* SWINNERTON.

Mr. *Kindersley*, and Mr. *G. Russell*, for the motion.

Mr. *Tinney*, *contrà*.

Feb. 15. *The* MASTER *of the* ROLLS (after stating the facts).

The question raised upon this motion is, whether this proceeding is regular. I have looked into an old book of practice, *Bohun's Cursus Cancellariæ*, where there is this passage: "It is said the commissioners, upon an ordinary *dedimus* or commission, have power to return nothing but an answer only; but if a plea or demurrer only be returned, it will be filed as if it came in without commission, but at the defendant's peril of paying five marks costs." (p. 106.) This passage is copied into *Wyatt's Practical Register*, and also into the last edition of *Harrison's Practice*. In *Gilbert's Forum Romanum*, a book of considerable authority, it is said, "If the defendant takes out a commission to answer, he cannot return a plea or demurrer; because the commission is to answer or contest in the cause, which does not give the commissioners authority to receive any exception in relation to such contest." (p. 93.) We find also in a very modern book, *Turner and Venables' Practice*, various remarks on this subject, and among others, that under an ordinary *dedimus* an answer only can be taken.

Considering, as I do, that the caption of the commissioners ought to be correct, and that what is expressed by the Defendants to have been taken by the commissioners ought to be in conformity with the authority, an answer to one part, and a demurrer to another part of a bill under an authority to the commissioners to take an answer only, cannot be regular.

At

1836.

TOMLINSON v. SWINNERTON.

At the same time I have not been able to find any decided authority on the point. In all the cases cited at the bar, and in all the cases I have been able to find, there was either an order for time, or the defendant was in contempt, circumstances which make a considerable difference; and, upon an inquiry which I have caused to be made, it has been stated to me, that when the ordinary *dedimus* issued, and the commissioners returned that they took an answer, the proceeding was regular, though they took in fact a demurrer to one part and an answer to the remainder of the bill. The reason stated for this is, that the commissioners have nothing to do with the demurrer; a reason which is particularly unsatisfactory, for a special *dedimus* does give them authority to take a demurrer and answer. This practice is one which appears to have silently crept in, and which the commissioners can only support by suppressing all notice of the demurrer, and returning that as an answer to the whole bill, which is, in fact, an answer to one part of the bill, and a demurrer to the remainder.

But besides this proceeding, which I consider irregular, there are two other irregularities which have not been noticed in the argument. First, the title, which stands as "the joint and several demurrer and answer of the Defendants to the bill of complaint," should have been, "the joint and several demurrer of the Defendants to part of the bill, and the joint and several answer of the Defendants to the remainder;" and, secondly, the demurrer does not bear the signature of counsel. Upon all these grounds I must order this demurrer and answer to be taken off the file, but without costs, considering that the Defendants received the advice upon which they acted from the officers of the Court.

1836.

Feb. 9. 15.

RAYSON *v.* LEES.

Where a Plaintiff obtains an order for a commission to examine witnesses, and serves it on the Defendant, his subsequent abandonment of such order will not withdraw the case from the operation of the seventeenth new order of 1831.

A MOTION was made, on the part of the Defendant, to dismiss the bill for want of prosecution under the seventeenth of the New Orders of 1831. On the 22d of *April* 1834, the Defendant was served by the Plaintiff with an order for a commission to examine witnesses; a rule to produce witnesses was entered on the 27th of *May*, and a rule to pass publication on the 5th of *June*; after which time it was admitted that it was understood on both sides that the commission to examine witnesses was to be abandoned, and, by an arrangement between the parties, the Plaintiff obtained, on the 9th of *June*, an order to enlarge publication till the following *Michaelmas* term, since which time no step had been taken.

Mr. *Walker*, in support of the motion.

Mr. *Flather*, *contrà*, contended that the seventeenth order did not apply to cases in which the plaintiff did not require a commission to examine witnesses, and this was a case of that description, for though the order for a commission had originally been obtained, it was afterwards abandoned, and the Defendants knew that the Plaintiff did not require it. The case of *Williams* v. *Janaway* (*a*) shewed that the seventeenth order did not apply, except in a case where the plaintiff wanted a commission, and that in such a case as the present, the old practice as stated in a late *Anonymous* case before the Vice-Chancellor (*b*) remained unaltered. In a late case the

(*a*) 6 *Sim.* 77. (*b*) 5 *Sim.* 497.

the Vice-Chancellor had held that it was competent to a plaintiff to abandon a commission to examine witnesses at any time, and such abandonment, even if made at the bar, would take the case out of the seventeenth order.

1836.

RAYSON v. LEES.

Mr. *Walker*, in reply, said that *Williams* v. *Janaway* had no application, as, in that case, there was no commission to examine witnesses; but in the present case the Plaintiff, by obtaining an order for a commission, and serving it on the Defendant, had brought himself within the seventeenth order; and no subsequent abandonment of the commission would take the case out of that order.

The MASTER *of the* ROLLS. *Feb.* 15.

The question is, whether this case falls within the provisions of the seventeenth New Order; and it is said, on the part of the Plaintiff, that the case does not fall within that order, because the Plaintiff did not want a commission to examine witnesses. It is unnecessary to enter into the question which has been raised, whether the seventeenth order applies to any case other than that in which a party requires a commission to examine witnesses, because it is clear, in this case, that the Plaintiff, by obtaining an order for a commission, and serving it on the Defendant, did require a commission to examine witnesses. It appears, however, from certain correspondence which, though not strictly in evidence, is not disputed, that some time previously to the 5th of *June*, when, by an arrangement between the parties, the Plaintiff obtained an order to enlarge publication until the following *Michaelmas* term, there was an understanding on both sides that the Plaintiff had abandoned the order for a commission, and that no commission was to issue.

The

1836.

RAYSON *v.* LEES.

The question is, whether by such abandonment of the order for a commission to examine witnesses, a case which has once come within the seventeenth order, can be withdrawn from its operation. It has been stated at the bar that the Vice-Chancellor has decided that a party may abandon an order for a commission to examine witnesses at any time; and that, upon a mere declaration at the bar by a Plaintiff, who had obtained an order for a commission, that he no longer wanted it, a case was held to be taken out of the seventeenth order. Such a rule of practice, if the effect of the Vice-Chancellor's decision were accurately stated, would seem very questionable; and, upon inquiry, I can find no instance of any similar proceeding in this Court. I am clearly of opinion, therefore, that this case falls within the seventeenth order.

Feb. 16, 17. 22.

BETWEEN

THOMAS WILLIAM MELLER, JAMES HUNT, THOMAS HARDY, SAMUEL PALMER, AND THOMAS ENGLAND - Plaintiffs.

AND

WILLIAM WOODS, CHRISTOPHER GABRIEL, AND THOMAS GARNER GABRIEL Defendants.

Where a deposit of a lease was made to secure a debt, and from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mortgagor, on a bill filed by the equitable mortgagee to have the lease sold, is entitled to the usual time to redeem.

THE bill was filed by *William Meller* and the other Plaintiffs above-named against *William Woods*, *Christopher Gabriel*, and *Thomas Garner Gabriel*, and it

1836.
MELLER
v.
WOODS.

it prayed that the Plaintiffs might be declared to have an equitable mortgage or lien upon the leasehold premises therein mentioned, and that the same premises might be sold, and what was due to the Plaintiffs paid out of the proceeds of the sale, or that a good and valid legal mortgage of the said leasehold premises might be executed to the Plaintiffs. The bill also prayed for a receiver.

The Plaintiffs, *Thomas William Meller* and *James Hunt*, were commissioners of assessed taxes, acting for the third division of *East Brixton*, and *William Thomas Woods* was a collector of assessed taxes for the second division of the liberty of *Lambeth Dean*, duly appointed for the year ending the 5th of *April* 1832, and also a collector of land-tax, and duties on pensions, offices, and personal estates, for the year ending the 25th of *March* 1832.

By a bond dated the 10th of *October* 1831, *William Thomas Woods*, the Defendant *William Woods*, *William Sangster*, and *Harriet Butler*, became jointly and severally bound to the Plaintiffs, *Thomas William Meller* and *James Hunt*, two of the commissioners, in the sum of 5300*l.*, the bond being conditioned to be void on payment, by the obligors or their or either of their heirs, executors, or administrators, of all such sums as *William Thomas Woods* should, as such collector of taxes, receive.

By another bond of the same date *William Thomas Woods*, the Defendant *William Woods*, and *William Sangster*, became jointly and severally bound to the same Plaintiffs in the sum of 63*l.*, the bond being conditioned to be void on payment by the obligors, their or either of their heirs, executors, or administrators, of such sums as *William Thomas Woods* should, as such collector of land-tax and duties on pensions, &c. receive.

1836.

MELLER v. WOODS.

William Thomas Woods was again duly appointed collector for the same division of assessed taxes, for the year ending the 5th of *April* 1833, and of land-tax for the year ending the 25th of *March* 1833; and by two bonds respectively bearing date the 12th of *October* 1832, *William Thomas Woods*, the Defendant *William Woods*, *Harriet Butler*, and *Richard Harford* became jointly and severally bound to the Plaintiffs, *Thomas William Meller* and *Thomas Hardy*, in the sums of 4847*l.* and 63*l.* respectively, the conditions of the bonds being similar to those of the bonds of the preceding year.

In *March* 1833 *William Thomas Woods* became a defaulter; and, after the remedies given by the act to the commissioners had been enforced against his lands and goods, there remained due to the commissioners in respect of such default the sum of 1800*l.*

The Plaintiffs made application for payment of that sum to the Defendant, *William Woods*, one of the co-obligors, and the father of the defaulter, and *William Woods*, being unable to satisfy the demand, deposited with the clerk of the commissioners, as a security for the payment of the 1800*l.*, a lease for ninety-nine years of certain premises at *Balham Hill*, and thereupon signed the following memorandum, dated the 13th of *September* 1833: — "I *William Woods*, of *Brixton*, *Surrey*, do hereby acknowledge that the lease of certain property at *Balham*, held under Mr. *Lucas*, deposited by me with the commissioners of land and assessed taxes for the third division of *East Brixton*, is as a security for the sum of 1800*l.*, or such further sum of money as may be due from my son, *William Thomas Woods*, as one of the collectors of the said taxes for the second division of *Lambeth Dean* for the years 1831 and 1832, for whom I am one of the sureties."

The

1836.

MELLER v. WOODS.

The Defendant, *W. Woods*, at the same time, by way of further security, executed to the Plaintiffs, *Thomas William Meller* and *Thomas England*, a warrant of attorney to confess judgment for the sum of 1800*l.*, upon which warrant of attorney judgment was entered up.

On the 21st of *March* 1834, the Defendant *W. Woods* raised the sum of 1000*l.* by a mortgage of the leasehold premises to the Defendants, *Christopher Gabriel* and *Thomas Garner Gabriel*, subject to the lien of the commissioners; and that sum of 1000*l.*, after payment of costs and expenses, was applied by the Defendant *Woods* in part satisfaction of the debt due from him to the commissioners.

The Defendant *Woods* admitted by his answer, that the sum of 875*l.* remained due to the Plaintiffs in respect of the monies which had come to the hands of *Thomas William Woods* as collector of assessed taxes and land tax; and the other Defendants by their answer stated, that they believed a considerable sum was still due and owing from the Defendant *Woods* to the Plaintiffs in respect of such monies.

It was agreed and understood between the Plaintiffs and the Defendant *Woods*, on the deposit of the lease, that no interest was to be paid on the principal sum so secured, and the question was whether, under such circumstances, the Plaintiffs were or were not entitled to an immediate sale of the leasehold premises.

Mr. *Palmer*, for the Plaintiffs.

In *Pain* v. *Smith* (*a*), it was decided that an equitable mortgagee was entitled to a sale of the estate of which the

(*a*) 2 *Mylne & Keen*, 417.

1836.

MELLER v. WOODS.

the deeds were deposited. Whether any time was to be allowed to the equitable mortgagor for the redemption of the deposited deeds was not determined in that case; but that question was afterwards discussed in *Parker* v. *Housefield* (*a*), and it was there undoubtedly decided that in ordinary cases an equitable mortgagor was entitled to six months' time to redeem, as in the case of a legal mortgage. But the present is not an ordinary case of equitable mortgage. The Defendant *Woods* has already delayed the payment of the debt due from him in consequence of the default of the collector for three years; the tax-office is now pressing the commissioners for the money, and, under such circumstances, it would be in the nature of a public inconvenience, as well as against the justice of the case, to allow the Defendant six months' further delay. There is another peculiarity in this case which distinguishes it from an ordinary equitable mortgage, and takes it out of the rule laid down in *Parker* v. *Housefield*. As the government does not charge the commissioners with interest, the commissioners do not charge the sureties with interest. From the nature of the transaction, therefore, the Plaintiffs will not receive the ordinary compensation for delay. Upon these grounds, it is submitted, the Plaintiffs are entitled to an immediate sale.

Mr. *Teed*, *contrà*.

Parker v. *Housefield* has established the rule that an equitable mortgagor stands exactly in the same situation as a legal mortgagor with respect to his right to six months' time to redeem. The present case is not distinguishable from the ordinary case of an equitable mortgage by the deposit of deeds; nor can the public nature of the duties which the commissioners have to discharge, or the supposed public inconvenience that may result from

(*a*) 2 *Mylne & Keen*, 419.

from the delay, make the least difference in the transaction. But it is said that the non-payment of interest distinguishes this from the ordinary case of an equitable mortgage, and that the payment of interest is considered by the Court as a compensation for the usual time allowed to redeem. There is no authority for that proposition, nor is the time to redeem allowed upon the principle that the delay is compensated by the payment of interest. The principle upon which the time to redeem is allowed is, that the mortgagee, whether legal or equitable, may not take an unfair advantage of the mortgagor by forcing on an immediate sale, and excluding the owner of the equity of redemption, or the depositor of the deeds from an opportunity of regaining possession of his property or his deeds, or at any rate of providing for the sale of his property upon the most advantageous terms.

1836.

MELLER v. WOODS.

Mr. *Palmer*, in reply.

The MASTER *of the* ROLLS.

Feb. 22.

The Plaintiffs in this case are commissioners of assessed taxes, and the bill prays for the sale of a lease which was deposited by way of equitable mortgage by the Defendant *William Woods*, as a security for the sum of 1800*l.*, in which sum that Defendant was bound to the Plaintiffs as surety for his son, a collector of taxes, who made default to that amount. The Defendant *William Woods*, being called upon for payment by the commissioners, prevailed upon them to give him time, and, by way of inducing them to do so, deposited with them the lease in question, and at the same time signed a memorandum stating the purpose for which the deposit was made. From the nature of the transaction, it is admitted on both sides that the principal

1836.

MELLER v. WOODS.

sum secured was not to bear interest. The Defendant *Woods* subsequently paid, in part satisfaction of the debt, the sum of 1000*l.*, which he raised by a mortgage of the leasehold premises, subject to the lien of the commissioners, to the Defendants *Christopher Gabriel* and *Thomas Garner Gabriel*. There remained the sum of 875*l.*, which is admitted by the answer of *Woods* to be due from him to the commissioners; and, that sum not having been paid, the present bill was filed to obtain the benefit of the equitable mortgage. The other Defendants are not bound by the admission of *Woods*, but they admit that a considerable sum is due from *Woods* to the Plaintiffs. Under these circumstances they insist, as they have a right to do, that an account should be taken; and further, that an equitable mortgagee cannot be in a better situation than a legal mortgagee, and, as against a legal mortgagee, the rule of the Court is, that the mortgagor is entitled to six months' notice to redeem.

The Plaintiffs, partly upon the ground of the public inconvenience which, it was said, was likely to arise from delay; and partly upon the ground that, as the principal debt does not carry interest, there is no compensation, as in ordinary cases, for delay, claim a right to an order for an immediate sale of the estate. At the hearing, I intimated that the Court could not attend to any argument founded solely upon the inconvenience that might arise from delay; but, as the particular case appeared to be one of some hardship to the Plaintiffs, who had no compensation, by way of interest, for the time which the rule of the Court allows to mortgagors, I wished to ascertain whether any authority could be found upon which this case could be excepted from the rule which has been laid down by the present Lord Chancellor in *Parker* v. *Housefield*. In many cases

1836.

MELLER v. WOODS.

cases the Court considers the payment of interest as a compensation for delay, and if I had found any authority for the application of that principle to the present case, I should have been inclined to accede to the prayer for an immediate sale. But I have not been able to find any case which would justify the Court in departing from the rule, which must be considered as established, as to the time allowed for redeeming mortgages whether legal or equitable. I have thought it right to consult the Lord Chancellor on this subject, who concurs with me in the conclusion to which I have come. I must, therefore, in this case, order an account to be taken of what is due to the Plaintiffs from the Defendant *Woods;* that six months' time be allowed to the Defendant; and that, in default of payment in that time, the estate be sold. The Plaintiffs are entitled to a receiver according to the prayer of their bill.

1836.

BETWEEN

Jan. 27. WILLIAM EVANS, JOHN EVANS, AND THOMAS FINNEMORE EVANS on the part of themselves and all other members or partners of the *French* Brandy Distillery Company, except the Defendants, Plaintiffs.

AND

HENRY STOKES, RICHARD CUERTON the elder, JOHN GORE, CHARLES SMITH (out of the jurisdiction) JOHN BAILEY, WILLIAM THOMPSON, JOHN THOMAS BETTS, RICHARD CUERTON the younger, and RICHARD TAYLOR, - - Defendants.

In a suit for the purpose of having the affairs of a dissolved joint stock company settled, and wound up under a decree of the Court, and praying for accounts of the partnership transactions, and that a sale of the partnership property by the directors might be declared fraudulent and void, all the members of the company, however numerous, must be parties to the suit.

IN *November* 1828, the *French* Brandy Distillery Company, which had been established about three years, was dissolved in pursuance of the resolutions adopted by a majority of the shareholders at a special general meeting of the proprietors, held on the 27th of the previous month of *October*, and the partnership premises, plant, implements, and fixtures were sold upon certain conditions to the Defendant *John Thomas Betts*, who had projected the company, and who continued, after its dissolution, to carry on the business under the firm of *Betts* and Co. The Plaintiffs were shareholders, and the Defendants, with the exception of *John Thomas Betts* and *Richard Cuerton* the younger, were directors of the company at the time of its dissolution. The bill alleged that the dissolution had been fraudulently procured by the Defendants, *Betts*, *Stokes*, and *Cuerton* the elder, and that the majority of the members

1836.

EVANS v. STOKES.

bers of the company had been induced to consent to such dissolution by false representations as to the unprofitable state of the concern; and it prayed that the affairs of the partnership or company might be wound up and settled by and under the decree and direction of the Court; that accounts might be taken of the partnership property received by the Defendants the directors; that the sale of the business and premises, plant and effects to the Defendant *Betts* might be declared to be fraudulent and void, as against the Plaintiffs and the other members of the company, and that the same might be set aside; that the said premises, plant, and effects might be resold under the direction of the Court, or that the Defendants, *John Thomas Betts*, *Henry Stokes*, *Richard Cuerton* the elder, and *Richard Cuerton* the younger might be charged in account with the full value thereof at the time of the dissolution of the company, and that the Defendant *John Thomas Betts* might be decreed to pay what was due from him to the company; that an account might be taken of the profits made by the last-named Defendants in the business since the dissolution of the company, and that they might be charged in account with the amount of such profits; that all the Defendants might be charged with the profits made by them respectively from the sales of shares in the company, and that a sum of 3300*l.* paid by them to one *Vetter*, in discharge of his claims against the company, might be disallowed to them.

The Defendants, charged with having concerted the dissolution, denied the fraud alleged by the bill, and insisted that the dissolution had been *bonâ fide* recommended as the best proceeding that could be adopted for the interest of the shareholders under the existing circumstances of the concern, and that the terms of the agreement

1836.

EVANS v. STOKES.

agreement by which the partnership property had been sold to the Defendant *Betts* were fair and equitable.

The pleadings having been opened, a preliminary objection for want of parties was taken to the suit.

Mr. *Pemberton* and Mr. *Purvis*, for the Defendants, *Cuerton* the elder, *Cuerton* the younger, and *Gore*, in support of the preliminary objection.

The Plaintiffs seek by their bill to have the affairs of a partnership or company, which is now dissolved, and in which they claim to be interested, wound up and settled under a decree of the Court, in the absence of all the other persons interested in the partnership, except the Defendants. In the first place, the Plaintiffs have no interest whatever in the partnership, for two of them have forfeited their shares by not having paid up their calls, it being expressly provided by the partnership deed, that in such case it should be competent to the Directors to declare the shares of defaulters forfeited, and the other Plaintiff never executed the partnership deed; and even if it be admitted that the Plaintiffs who have not paid up their calls retain an interest until the forfeiture is declared, there will be a misjoinder of parties who have an interest with a party who has none, which will be fatal to the frame of the bill; *King of Spain* v. *Machado* (*a*), *Makepeace* v. *Haythorne*. (*b*) But, besides that objection, it is clear that there is nothing in this case to take it out of the general principle, which requires that all persons interested in the subject of a suit should be before the Court, and that, as this bill seeks to have the affairs of the partnership

(*a*) 4 *Russ.* 225. (*b*) 4 *Russ.* 244.

ship settled in the absence of a great number of the shareholders, it is defective for want of parties.

The exceptions to which the general rule, requiring the presence of all parties interested in the suit, is subject, may be collected from the authorities; and although these exceptions have been extended, in some cases, to partnerships, the circumstances under which the rule has been relaxed have differed entirely from those under which the present suit is instituted. In *Lloyd* v. *Loaring* (*a*) the Court intimated that persons jointly interested might properly sue on behalf of themselves and others, provided it was manifestly inconvenient to justice to make all of them parties. In the present case it is plainly against justice to seek for the final winding up and settlement of the concerns of the partnership in the absence of a large number of the members. In *Cockburn* v. *Thompson* (*b*), where the bill was filed by several of the proprietors of the Philanthropic Annuity Institution against the solicitor of the institution, who was charged with a breach of trust, Lord *Eldon* decided that in the case of a very numerous association in a joint concern the general rule might be dispensed with; but he expressly annexed to the relaxation of the rule the condition, that the case should be one where the rule was incapable of application, and where a failure of justice would be occasioned by an adherence to it. In *Gray* v. *Chaplin* (*c*) it was held that two shareholders of a canal company were entitled to file a bill, on behalf of themselves and all the other shareholders, to set aside an agreement entered into by the commissioners of the canal; and the ground of the decision was, that the agreement contravened the provisions

(*a*) 6 *Ves.* 773.
(*b*) 16 *Ves.* 321.
(*c*) 2 *Sim. & Stu.* 267.

1836.

EVANS v. STOKES.

visions of the act of parliament under which the canal was made, and that the suit must, therefore, be intended to be beneficial to every shareholder. The common interest, which was the ground of that decision, is wholly wanting in the present case, for the dissolution of partnership complained of by the Plaintiffs, was and still is approved and acquiesced in by a majority of the proprietors. In *Van Sandau* v. *Moore* (*a*), where the Plaintiff, who was a shareholder in a joint stock company, filed a bill against the directors and all the shareholders, between two and three hundred in number, for a dissolution of the concern and an account, Lord *Eldon*, in giving judgment upon the motion, makes an observation which shews that, in his opinion, such a bill as the present could not be sustained. "I have not forgotten," said his lordship, "that, in the course of the argument, Mr. *Van Sandau* stated, that when he got the answers of some of the Defendants, he would amend the bill by making it a bill on behalf of himself and all others of the partners, except such of them as he should retain as defendants. But in my judgment that cannot be done."

Next came the case of *Blain* v. *Agar* (*b*), where the Plaintiffs sued on behalf of themselves and other persons, who were subscribers together of 1690*l.* shares in the *British* Mining Association, such other persons having executed a deed by which they assigned, upon certain conditions, their interest in the concern to the Plaintiffs, and constituted the Plaintiffs their attornies for the purpose of prosecuting their claims and interest in any action or suit. The bill was filed against the directors for the purpose of recovering the deposits paid by the Plaintiffs and the other shareholders on the ground of fraud.

(*a*) 1 *Russ.* 441. (*b*) 1 *Sim.* 37.

1836.

EVANS v. STOKES.

fraud. A demurrer was taken *ore tenus* that the persons who had assigned their interests upon condition to the Plaintiffs ought to have been made parties to the suit; and that demurrer was allowed, the Vice-Chancellor (Sir *John Leach*) observing that, though it might be true that those persons were very numerous, and that naming them as parties on the record would render it impossible for the Plaintiffs to obtain a decree in the case, he should be making a new practice if he yielded to arguments founded upon the inconvenience, in the particular case, of adhering to the general principles of the Court. The bill in that case was afterwards amended, and, among other amendments, the Plaintiffs alleged that they were ignorant of the names of all the shareholders except those who were parties to the suit. In the amended shape the bill was sustained, and the Plaintiffs in the present case accordingly introduced a similar allegation in their original bill; but that allegation can avail them nothing, as the Defendants in their first answer set out the names and residences of all the shareholders at the time of the dissolution. Of the information thus afforded to them, the Plaintiffs have, in their amended bill, taken no notice whatever.

The principle upon which *Blain* v. *Agar*, and the demurrer to the first bill in *Van Sandau* v. *Moore* were decided is followed up in *Long* v. *Yonge* (*a*), where the bill, as in the present case, was filed by some of the members of a company on behalf of themselves and the rest of the members, and prayed that the concerns of the company might be wound up, and that the surplus effects might be divided among the members. The Vice-Chancellor, in that case, observed that the very nature and object of the suit were to deprive persons, who

(*a*) 2 *Sim.* 369.

1836.

EVANS v. STOKES.

who were not parties on the record, of that right which, upon the face of the bill, they possessed. In *Walburn* v. *Ingilby* (*a*), and in a late case of *Mocatta* v. *Ingilby*, before the present Lord Chancellor, when Master of the Rolls, the same general principle is recognised; namely, that in a suit of which the object is to adjust and wind up the concerns of a company or a partnership, and to obtain a decree by which the rights of all the partners are to be bound, all the partners, however numerous, must be before the Court.

An adherence to this rule is the more necessary in the present case, as the Plaintiffs pretend to represent members of the company who, upon the very statement made in the bill, differ altogether from the Plaintiffs in the views which they entertain of their rights and interests as partners. The Plaintiffs desire to have the dissolution declared fraudulent, while a vast majority of the partners acquiesce in that dissolution as the most beneficial measure for the company which, under all the circumstances, could have been adopted. But supposing the three Plaintiffs to be right, and that, in insisting upon the impropriety of the dissolution, they take a sounder view of the interests of the partnership than the majority of the proprietors, how is it possible for the Court to determine that question in the absence of the majority? In the late case of *Small* v. *Atwood* (*b*), where this subject was much discussed, Lord *Lyndhurst* recognised the principle established by all the authorities, that, where a few partners are permitted to sue on behalf of themselves and the other partners, there must be a community of interests between the parties suing and those who are absent, and the object of the suit must be manifestly for the advantage of the absent members.

Mr.

(*a*) 1 *Mylne & Keen*, 61. (*b*) 1 *Younge*, 407.

1836.

EVANS v. STOKES.

Mr. *Kindersley*, Mr. *W. C. L. Keene*, Mr. *Kenyon Parker*, Mr. *Girdlestone*, jun., and Mr. *Campbell*, for other Defendants.

Mr. *Tinney* and Mr. *Goodeve*, *contrà*.

There has been no declaration by the directors that the shares of the two Plaintiffs, who have not paid up their instalments, were forfeited, and until a forfeiture is declared, the members of the company retain all their rights. Many of the shareholders never executed the deed; and the Plaintiff, *Thomas Finnemore Evans*, was one of that class. Indeed, on the first formation of the company, there was no intention of having a deed, and, though it was afterwards determined that a deed should be executed, the rights of the shareholders attached independently of the execution of the deed.

This bill seeks to set aside a fraudulent transaction, and, therefore, comes strictly within the rule upon which the court has proceeded in allowing joint-stock companies to be represented by a few of their members, because it is manifestly for the benefit of the general body of the company that fraud in the management of its affairs should be made the subject of judicial investigation. The dissolution, no doubt, took place with all the necessary forms; but the case made by the bill is, that the transfer of the partnership property to *Betts* was fraudulent, and, though it should turn out that the dissolution, under all the circumstances, must stand, the Plaintiffs, if they establish their case, will be entitled to have the property, which has been fraudulently transferred, restored, and divided among the members of the company. *Small* v. *Atwood* is a direct authority in favour of the Plaintiffs. Lord *Lyndhurst*, with reference to that case said, " The object of this suit is to get rid of a disadvantageous agreement on the ground of imputed

1836.

EVANS v. STOKES.

puted fraud, an agreement which is said to be disadvantageous and ruinous to the interests of the company; and all the members of the company therefore stand, in that respect, in the same situation; they have the same interest to get rid of the agreement, and some may sue in their own name and in the name of the whole association." (*a*) In *Long* v. *Yonge* the bill prayed for a dissolution of the partnership; whereas in this case the Plaintiffs seek relief against the consequences of a dissolution, which relief — even if it be conceded, and the Plaintiffs are willing to concede, that the dissolution should not be disturbed — cannot but be advantageous to all the members of the company whose interests have been affected by the fraudulent transfer of their property.

The MASTER *of the* ROLLS.

This is a bill in which it is sought that the affairs of the partnership may be wound up and settled by and under the decree of this Court, and that accounts may be taken of the partnership property. The bill also prays that a sale of part of the partnership property by the directors to the Defendant *Betts* may be set aside. It is perfectly obvious that a suit, where all the accounts of the partnership are to be taken, and the rights of all the partners are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those partners. The cases, in which suits have been permitted to be instituted by a few persons on behalf of themselves and a numerous body of other persons

(*a*) 1 *Younge*, 459.

persons, have been cases in which there was plainly a community of interest between the Plaintiffs and those whom they represented; but this is a case in which it is not disputed that there is a great diversity of interests as between different classes of the members of this partnership, and yet the Court is called upon to wind up the whole transactions of the partnership in the absence of a great number of the partners. The frame of the suit is plainly defective; and the cause must stand over, therefore, with liberty to the Plaintiffs to amend by adding parties.

HEARDSON *v.* WILLIAMSON.

Feb. 17.

THIS was a bill for the specific performance of a contract for the purchase of an estate by the Defendant.

The only question was as to the validity of the title, and it was agreed between the parties to take the opinion of the Court upon that point without a reference.

Where an estate is devised, without any limitation of the quantity of interest, to trustees in trust for a limited purpose, with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees will cease on the satisfaction of the limited purpose, and will vest in the persons beneficially entitled in remainder.

James Heardson, by his will dated the 1st of *September* 1819, devised to *William Smith* and *Robert Maples*, and the survivor of them, and the executors and administrators of such survivor, his ten acres, more or less, in *Pinchbeck*, in the county of *Lincoln*, and also his house or tenement in *Surfleet*, and the fixtures of his shop, in trust for sale, and with the money arising from such sale, after deducting expenses, in trust to pay off all such sums as at the time of his decease should be due and owing upon mortgage of all or any part of his real estates thereinafter mentioned,

1836.
HEARDSON
v.
WILLIAMSON.

except the house thereinafter given to his son *James*, and the house thereinbefore devised, and after payment and discharge thereof, if any surplus should remain in trust to pay the same to his wife *Sarah Heardson*, for her own use; and the testator thereby gave and devised to the said *Sarah Heardson* for her life, if she continued his widow, all and every other his messuages, lands, tenements, hereditaments, and premises whatsoever, situate in the parishes of *Pinchbeck* and *Surfleet* or elsewhere, subject to the payment of his sister *Margaret King*'s annuity of 10*l.* for life thereinafter given, and also to the payment of 100*l.* yearly till the above mortgage debts directed to be paid by the sale aforesaid were discharged, in case the estate and effects thereinbefore directed to be sold for that purpose should not thereto fully extend; and from and after the decease of his said wife, or her intermarriage again after his decease, in case the said mortgage debts so directed to be discharged should not then have been fully paid off, the testator gave and devised all such estate so devised to his wife to the said *William Smith* and *Thomas Maples* and the survivor of them, and the executors and administrators of such survivor, in trust to let the same for the best rents that could be obtained, and apply such rents for payment of the said mortgage debts, should any part still remain, until the whole should be fully paid off and discharged by the gradual receipt of such rents and profits of his, the testator's, estate; and from and after the decease of his said wife, or her intermarriage again after his decease, or the final liquidation and payment of his mortgage debts as aforesaid, as the case might happen, the testator gave and devised to his son, *John Guy Heardson*, the Plaintiff, and his assigns, for his life, subject to the payment of one fourth part of his said sister's annuity for life, his messuages or tenements, lands and hereditaments at *Surfleet* and *Pinchbeck* therein described;

1836.

HEARDSON v. WILLIAMSON.

scribed; and after the decease of *John Guy Heardson* the testator gave and devised the said messuages or tenements, &c. to such child or children as the said *John Guy Heardson* should have lawful issue of his body, and to their, his, or her heirs or assigns for ever, to take as tenants in common, if more than one, and in default of such issue the testator gave and devised the same real estates to his sons, *James*, *William*, and *Guy Heardson*, their heirs and assigns, as tenants in common.

The testator died in *January* 1820. At the time of his decease, a part of the real estate devised by his will was subject to two mortgages, one made by an indenture of demise, in the year 1804, for a sum of 700*l.*, and another made by an indenture of demise in the year 1811 for a sum of 600*l.*

In *May* 1822, *Sarah Heardson* paid 200*l.* in part satisfaction of the mortgage secured by the indenture of 1811.

In the year 1825, the trustees sold the ten acres of land devised in trust for sale, and with the money arising from the sale, amounting to 680*l.*, and a sum of 20*l.* paid by *Sarah Heardson*, paid off the mortgage for 700*l.* secured by the indenture of 1804.

Sarah Heardson died on the 27th of *September* 1831, and the annual sum of 100*l.*, charged on the estate devised to her, not having been applied by her to the discharge of the mortgage debts of the testator, the trustees in *January* 1832, with money arising from the sale of the testator's house at *Surfleet* devised in trust for sale, and other money arising from the personal estate of

1836.

HEARDSON v. WILLIAMSON.

Sarah Heardson, paid off the residue of the mortgage debt secured by the indenture of *May* 1811.

By an indenture of release, dated the 3d of *February* 1835, between the Plaintiff of the one part, and *Charles Francis Bonner* of the other part, the Plaintiff, having no child living, with a view to destroy the contingent remainders, and acquire the fee-simple, conveyed the estates in question, discharged of dower, to *Charles Francis Bonner* and his heirs, to the use of the Plaintiff and his heirs; and the question was, whether the contingent remainders to the children of the Plaintiff, and, in default of children, to the brothers of the Plaintiff, were effectually destroyed by that conveyance; or whether the trustees to whom the estate was limited after the life estate of *Sarah Heardson* for the purpose of paying off the mortgage debts, if those debts should not have been satisfied by the widow, took a fee, in which case the contingent remainders would be preserved.

Mr. *Pemberton* and Mr. *Metcalfe*, for the Plaintiff.

It is not disputed that the remainders to the children, and the remainders over in default of children, are contingent; and the only question is, therefore, whether the trustees who were to see to the payment of the mortgages took such an estate as to preserve those remainders; for, if they did not, the title is unimpeachable. In the first place it is to be observed that the limitation is to the trustees, their executors and administrators, and not to the trustees and their heirs. The rule of law is, that where trustees are required to perform a particular duty, and the estate which they are to take is not expressly limited to them, they shall take the smallest estate which will enable them to discharge the particular duty. Now the words upon which the estate of the

trustees

1836.

HEARDSON v. WILLIAMSON.

trustees is to arise are these: "After the decease of my said wife, in case the said mortgage debts shall not then have been fully paid off, I give and devise all such estate so devised to my wife to the said *William Smith* and *Thomas Maples*, and the survivor, and the executors and administrators of such survivor, in trust to let the same for the best rents that can be obtained, and apply such rents for payment of the said mortgage debts, should any part thereof still remain, until the whole shall be fully paid off and discharged by the gradual receipt of such rents and profits of my estate." Had the widow of the testator applied the annual sum which she was directed by the will to apply to the payment of the mortgage debts, those debts would have been fully discharged in her lifetime, and the trustees would have taken no estate under this devise. But, if there be any doubt, upon the language of the will, as to the quantity of interest intended to be given to the trustees, the estate of the trustees can only be such an estate as will enable them to do what the trust requires. The quantity of estate must be determined with reference to the purpose of the testator; and though a devise in fee might answer that purpose, the trustees will not take a fee, if a less estate is sufficient to carry the purpose of the testator into effect. This has been expressly decided in the case of *Doe dem. White* v. *Simpson*. (*a*) In that case the testator devised lands to two trustees and the survivor of them, and the executors and administrators of such survivor, in trust to pay certain annuities for lives, and a sum in gross, and from and after the payment of the said annuities, and money, he devised successive estates for life, with remainder to his nephew in tail, remainder to his own right heirs, and he also gave a general power of leasing to the trustees: it was held that, the

(*a*) 5 *East*, 162.

1836.
HEARDSON
v.
WILLIAMSON.

the purposes of the trust being all answered by the death of the annuitants and the raising of the money, the remainder-man in tail (the life-estates being spent) took the legal estate in the premises. Lord *Ellenborough*, in delivering the judgment of the Court, lays it down as a proposition which may be fairly inferred from the authorities, that, when the purposes of a trust can be answered by a less estate than a fee-simple, a greater estate than is sufficient to answer such purpose shall not pass to the trustees; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute.

The rule laid down in *Doe dem. White* v. *Simpson* has been followed in *Doe dem. Player* v. *Nicholls* (*a*), in which case Mr. J. *Bayley* says, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. The same principle is recognised in *James* v. *Biou* (*b*), where it was held that a trustee of the rents and profits of a mortgaged estate, under an old conveyance of the equity of redemption upon trust to pay certain debts which had been long since satisfied, was not entitled to redeem the mortgage.

Mr. *Tinney* and Mr. *Bellamy*, *contrà*.

The Defendant is a willing purchaser, if a good title can be made; and the point before the Court, though in form it appears to involve only a technical objection, does

(*a*) 1 *B. & Cress.* 342. (*b*) 2 *Sim. & Stu.* 600.

1836.

HEARDSON v. WILLIAMSON.

does in fact raise a substantial objection to the purchase; for, if the trustees have the legal fee, the children of the vendor, if he should have any, or the remaindermen, if he should have none, may bring ejectment, and the decree made in this suit will be no protection to the purchaser. It is not sufficient, therefore, that the inclination of the Court should be in favour of the title; but, to make the purchaser secure, the Court should be perfectly satisfied that the title is unimpeachable. There can be no doubt, in the first place, that the estate vested in the trustees. Though the trust would have been satisfied had the widow done that, which in pursuance of the directions of the testator she ought to have done, the Court cannot say, as against a purchaser, the mortgage debts not having been paid off at the death of the widow, that the trust did not vest in the trustees. The next question, therefore, is, what estate did the trustees take? A Court of equity will rather incline to the inference that trustees should take an estate that will support all the purposes of the will, and preserve instead of destroying contingent remainders. An estate given in trust to sell, a devise of the rents and profits, or a trust to raise a gross sum at a fixed time out of the rents and profits, will pass the fee; and whether the estate be given to trustees and their heirs, or to trustees, their executors or administrators, is immaterial for the purpose of vesting the fee in the trustees; *Gibson* v. *Montford*. (*a*) A trust to make a demise of an estate imports a trust to create a term out of the interest of the trustee; and if so, the trustee must have the reversion. A mere power to demise does not imply an estate in the person who is to exercise

(*a*) 1 *Ves.* sen. 491.

1836.

HEARDSON v. WILLIAMSON.

exercise it; but the lease may take effect out of the power, and not out of the estate. In *Doe dem. Tomkyns* v. *Willan* (*a*), Mr. J. *Bayley* says, that "where there are no words which distinctly create a power in the trustees, and the trustees are to demise for any term they think proper (although at the best improved rent), the true construction is that they are to create a term out of their interest; and, if so, they must have a reversion after that term entirely ceases." In *Doe dem. Keen* v. *Walbank* (*b*), where the testator directed his trustees to give receipts, pay money, and demise the premises in question, Lord *Tenterden* said, that "if leases made in pursuance of this direction would take effect out of the estate of the trustees, they must take the fee;" and his Lordship, being of opinion that the direction was to be considered as raising a trust, and not as creating a power, held, in conformity with *Doe dem. Tomkyns* v. *Willan*, that the trustees took the fee.

In the present case, the testator gives his estates in trust to let the same for the best rents that can be obtained. There is no question as to this being an express trust, and not a power; and as the leases are to be made out of the interest of the trustees, which is indefinite, that interest must be the fee. In *Doe dem. White* v. *Simpson* (*c*) a power of leasing was given to the trustees; and the decision did not turn upon the circumstance of the limitation being to the executors, and not to the heirs, but upon the leases being capable of taking effect out of the power. The will, in the present case, discloses the testator's intention of giving an estate to unborn children; and as a construction can be put upon the will which will support that intention, the Court will

(*a*) 2 *B. & Ald.* 84.
(*b*) 2 *B. & Ad.* 554.
(*c*) 5 *East*, 162.

will give effect to it by holding that the trustees take a fee.

Mr. *Pemberton*, in reply.

The rule laid down in *Doe dem. White* v. *Simpson*, that a trustee for a limited purpose shall not take a larger estate than that limited purpose requires, has been always followed, and, indeed, is not denied on the other side; but it is said that there was a leasing power in that case, and that the leases might take effect out of the power, and not out of the interest. But the power was coupled with an estate, and the express ground of the decision was that, the purposes of the trust being limited, and a term being sufficient to answer the purposes of the trust, the trustee did not take a fee. In *Doe dem. Tomkyns* v. *Willan*, and in *Doe dem. Keen* v. *Walbank*, the limitation was to the trustees and their heirs, and there was nothing to cut down the natural effect of that limitation. In this case, on the contrary, as in *Doe dem. White* v. *Simpson*, the natural effect of the limitation was to give only a term sufficient to answer the purposes of the trust.

The MASTER *of the* ROLLS, after stating the will.

The question here raised is, whether the trustees under this devise take the legal fee. There can be no doubt that the circumstance of the estate being limited to the trustees, their executors and administrators, and not to the trustees and their heirs, would not affect the vesting of the fee in the trustees, if the purposes of the will required it; and the question is, whether the purposes of the will did require that the trustees should take the fee. If the mortgage debts had been paid off in the lifetime of the widow, the trustees would have taken no estate after the decease of the widow; and in the event, which happened, of the mortgage debts not having

1836.

HEARDSON v. WILLIAMSON.

having been wholly paid off in her lifetime, they were to take only an estate until those debts were paid. I do not see the least necessity that, for that limited purpose, the trustees should have the reversion; and the debts having in fact been paid off, I am of opinion that the trust ceased, and that the legal estate vested in the Plaintiff.

Feb. 10. 12.

COOK *v.* HUTCHINSON.

By a deed between a father and son, reciting that the father was desirous of settling the property therein comprised, so as to make the same a provision for himself during his life, and for his wife and her children by him after his decease, he released and assigned the same and every part thereof to the son, upon the trusts thereinafter mentioned concerning the same. The father proceeded to declare the trusts as to part of his property in favour of his wife, a daughter, and a niece, but no trust was declared as to the surplus: Held, that the surplus did not result to the grantor, but belonged to the son; and, the father having been maintained by the son for fifteen years, a bill filed after the son's death by the father, and revived upon the father's death by his representative, was dismissed with costs as to that part of it which sought an account of interest.

BY an indenture of release and assignment, dated the 29th of *March* 1817, and made between *William Cook* the elder, of the one part, and *William Cook* the only son of the said *William Cook*, of the other part, reciting the several mortgages and bonds by virtue of which *William Cook* the elder was, as sole executor and residuary legatee under the will of *Michael Cook* his brother deceased, seised of the mortgaged premises therein described subject to redemption, and possessed of or entitled to the several sums thereby secured, amounting together to the sum of 2050*l.*, and interest due thereon, and also that he was possessed of or entitled to the several personal chattels, consisting of household furniture, linen, and china, and farming stock and other effects described in the several schedules annexed to the said indenture; and also reciting that *William Cook* the elder was desirous of settling the property to which he was so entitled in such manner

1836.

Cook
v.
Hutchinson.

manner as to make the same a provision for himself during his life, and for his wife *Margaret Cook* and her children by him after his death; it was witnessed that *William Cook* the elder bargained, sold, and released to *William Cook* the younger and his heirs the said mortgaged premises subject to such equity of redemption as the same were subject to; and it was further witnessed that *William Cook* the elder bargained, sold, assigned, and transferred to *William Cook* the younger, his executors, administrators, and assigns, the several principal sums amounting in the whole to 2050*l.* therein mentioned, so secured by the several mortgages and bonds as aforesaid, and the interest thereof respectively, to have, receive, and take the same upon to and for the trusts, intents, and purposes thereinafter declared concerning the same; and it was by the same indenture further witnessed that *William Cook* the elder bargained, sold, and delivered to *William Cook* the younger, his executors, &c. all the personal chattels specified in the schedules thereunto annexed, to hold the same personal chattels and all and singular other the premises thereinbefore bargained, sold, and assigned, and every part thereof to *William Cook* the younger, his executors, &c., upon, to, and for the trusts, intents, and purposes thereinafter declared concerning the same; that is to say, upon trust that he *William Cook* the younger, his executors, administrators, and assigns, should either permit and suffer the same several principal sums to remain in their then present state of investment, or should, with the consent in writing of *William Cook* the elder, during his life, and after his decease, then at the discretion of *William Cook* the younger, his executors or administrators, call in the same several principal sums or any part thereof, or sell, assign, or dispose of the same, as he or they should think fit, and, should with such consent or at such discretion as aforesaid, lay out and

1836.

COOK
v.
HUTCHINSON.

and invest the money which should come to his or their hands in his or their own name or names in the public funds, or upon government or real or other good securities and subject thereto, should, during the life of *William Cook* the elder, permit and suffer, and authorise and empower *William Cook* the elder and his assigns, to receive the interest dividends and annual proceeds of the same trust monies, stocks, and securities for his and their own proper use and benefit, and immediately after the decease of *William Cook*, the elder, should, by conversion into money of all or a sufficient part of the trust monies, stocks, funds, and securities thereinbefore mentioned, pay and satisfy the funeral expenses of *William Cook* the elder, and all the sums of money in which he should be indebted at the time of his death, and also the sum of 20*l.* to *Elizabeth Davison*, niece of *William Cook* the elder, and subject thereto, should out of the interest dividends and annual proceeds of the remainder of the said trust monies, &c., pay the annual sum of 20*l.* unto *Margaret* the wife of *William Cook* the elder, during the term of her natural life, to be paid by equal quarterly portions, and upon further trust that he *William Cook* the younger, his executors, administrators, and assigns, should, one year after the decease of *William Cook* the elder, and subject to the other trusts thereinbefore declared, pay or cause to be paid the sum of 500*l.* unto *Elizabeth* the wife of *John Davison* and daughter of *William Cook* the elder, to and for her own sole and separate use, or to her executors or administrators, or to whom she or they should direct or appoint; and it was by the said indenture also witnessed that *William Cook* the younger, his executors, administrators, and assigns, should stand possessed of all and singular the personal chattels specified in the schedules thereunto annexed, upon trust, to permit and suffer *William Cook* the elder, during his life, to have the free

1836.

COOK v. HUTCHINSON.

free use and enjoyment of the same respectively, and immediately after his decease, upon trust that *William Cook* the younger, his executors, administrators, and assigns should permit and suffer *Margaret Cook*, so long as she should continue the widow of *William Cook* the elder, and be neither the wife nor widow of any other person, to have the free use and enjoyment of all the chattels specified in the first schedule thereunto annexed, and subject to the trusts thereinbefore declared concerning the same personal chattels, it was thereby declared and agreed, that *William Cook* the younger, his executors, administrators, and assigns, should be possessed of and interested in the same respectively for his and their own proper use and benefit.

William Cook the elder, who was at the time of the execution of this deed upwards of eighty years of age, had two children, *William Cook* the younger, and *Elizabeth*, the wife of *John Davison*. The son entered into possession of the property, and carried on the business of the farm; and the father, with his wife and niece, lived in a house adjoining to that of the son, and was wholly supported by the son from the time of the execution of the deed until *November* 1832, when the son died, having made a will, by which he appointed the Defendants, *Ralph Hutchinson*, *William Agnesby*, and *George Simpson*, his executors. The stock on the farm was sold by the executors shortly after the death of their testator.

On the 29th of *January* 1833, *William Cook* the elder, upon an application made to him by the Defendants *Agnesby* and *Simpson*, signed by his mark the following receipt: — "Received of Messrs. *Ralph Hutchinson*, *William Agnesby*, and *George Simpson*, executors of the last will and testament of my late son, the sum of one

1836.

COOK
v.
HUTCHINSON.

one pound in full of all demands to the 20th of *November* last, for the interest and yearly produce of the money and effects arising under or by virtue of a certain deed of settlement bearing date on or about the 29th of *March* 1817, and made between me of the one part, and my said son of the other part; and I do hereby acknowledge that all arrears of the said annual interest and yearly produce, except the said one pound, hath been paid or accounted for to me by my said son up to the day of his death, which happened on the said 20th day of *November* last."

On the 2d of *August* 1833 *William Cook* the elder made his will, by which he bequeathed all his personal estate to his wife for life, and after her decease to his daughter, the plaintiff, *Elizabeth Davison*, and he appointed his wife *Margaret Cook* sole executrix of his will.

On the 15th of *October* 1833 the original bill was filed by *William Cook* the elder, and *Margaret* his wife, *John Davison*, and *Elizabeth* his wife, and *Elizabeth Davison*, the niece of *William Cook* the elder, against the executors of *William Cook* the younger; and it prayed for an account of the principal monies and farming stock and other effects assigned by the indenture of *March* 1817, and of the securities in which such principal monies were invested, and of the interest on such principal monies, and of the profits of the stock, and of the monies produced by the sale of the stock and effects since the death of *William Cook* the younger; and that the Defendants might be decreed to pay what should be found due to the Plaintiff *William Cook* the elder, for the aforesaid interest and profits, after deducting the small payments made to him from time to time for his support.

William

1836.

COOK
v.
HUTCHINSON.

William Cook the elder died on the 22d of *April* 1834; and the suit was revived by his widow and executrix.

The bill charged that *William Cook* the elder did not understand the nature and effect of the receipt signed by him, and that the Defendants, on the occasion when that receipt was signed, had taken advantage of the age and infirmities of *William Cook* the elder; but that charge was not supported by the evidence.

The questions raised in the cause were, whether there was a resulting trust to the grantor of the surplus of the property comprised in the deed of *March* 1817, as to which no trust was declared; and whether the Plaintiff *Margaret Cook*, as executrix of her deceased husband, was entitled to an account of interest and profits of the stock from the date of the deed to the death of *William Cook* the younger.

Sir *Charles Wetherell* and Mr. *Cooper*, for the Plaintiffs.

After the trusts declared in the deed of *March* 1817 in favour of the settlor's wife, his daughter, and his niece, there is no disposition of the surplus; and, unless it clearly appears that there was an intention on the part of the settlor to give the beneficial interest to his son, that surplus will result to the grantor. There is no express indication, on the face of the instrument, of an intention to give an immediate beneficial interest to the son. The property is expressly assigned to the son on the trusts thereinafter declared concerning the same, and no trust is thereinafter declared in favour of the son. Still less is there any indication of an intention to benefit the son, if we look *dehors* the instrument, for by his will the settlor bequeathed the whole of his property, subject to the life-interest of his widow, to his daughter.

But,

1836.
Cook
v.
Hutchinson.

But, whatever might be the settlor's intention as to the surplus of the capital, it is clear that, by the express language of this deed, he intended to reserve to himself all the benefit arising from the interest and produce of his property during his lifetime, and his representative is consequently entitled to the account prayed by the bill of the interest of the sums secured by the mortgages and bonds, and of the profits of the farm from the time at which the son entered into possession of the property. The attempt to obtain a release of the settlor's right to that account, by so gross and inartificial a proceeding as that of inducing a man in his ninety-eighth year to put his mark to a receipt in full of all demands in consideration of a sovereign, is plainly a transaction which cannot be supported in this Court. When the old man was afterwards made to understand the nature of the transaction, it appears, by the evidence of a witness in the cause, that he repudiated it, as far as he was able, by sending back the sovereign, and desiring that the receipt might be cancelled.

Mr. *Pemberton* and Mr. *Purvis*, *contrà*.

Unless it can be shewn that the father, in making a settlement by way of provision for his family, intended his only son to take no beneficial interest under that settlement, but to be a naked trustee, liable to account for every shilling of the income received during his father's lifetime, and entitled to participate in no part of the capital after his father's death, the argument in support of a resulting trust must fail. The question whether there is or is not a resulting trust depends, in every case, upon the intention of the testator or grantor; *King* v. *Denison* (*a*), *Hill* v. *Bishop of London* (*b*); and, even if the recital in this settlement did

(*a*) 1 *V. & B.* 260. (*b*) 1 *Atk.* 618.

did not furnish an express contradiction to such a supposition, it is an argument too extravagant to be successfully maintained, that, in a deed between a father and son, the express object of which was to provide for the whole family, the son was intended to take nothing. The claim to interest and to the profits of stock during the lifetime of the son is equally incapable of being supported. Out of an annual income of less than 100*l.* the son not only supplied the father, mother, and niece with every article of consumption, but paid their bills, and even furnished entertainment to a meeting of dissenting ministers which was held at short intervals in the father's house. The transaction between the executors of the son and the father was undoubtedly a somewhat inartificial one, but it was substantially a perfectly fair transaction, and was founded upon a notion very prevalent among certain classes of persons, and especially in remote parts of the country, where legal forms are not likely to be very accurately understood, that some money must pass between parties to bind a bargain or legal transaction of any kind. The principal witness by whom the transaction is sought to be impeached is a boy, fourteen years of age, who is made to answer interrogatories which he could not possibly have understood, and, among other things, to depose that he believed that *William Cook* the elder, when he signed the receipt, did not mean it to be as a release or acknowledgment that all arrears were satisfied. The Plaintiffs are of course entitled to an account of the capital, but there is no prayer for a decree in respect of any thing but payment of the interest; and as the bill charges fraud, which they have entirely failed to prove, they ought to pay the costs of the suit.

Sir *C. Wetherell*, in reply.

1836.

COOK
v.
HUTCHINSON.

The MASTER *of the* ROLLS.

Upon this deed a question is made, whether there is or is not a resulting trust to the grantor as to the surplus, with respect to which there is no declaration of trust; and for the purpose of determining that question, it is necessary to look carefully to the language of the deed, and to the circumstances of the particular case. In general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied, will result to the grantor; but that resulting trust may be rebutted even by parol evidence, and certainly cannot take effect where a contrary intention, to be collected from the whole instrument, is indicated by the grantor. The distinctions applicable to cases of this kind are pointed out in the case of *King* v. *Denison* (*a*) by Lord *Eldon*, who adopts the principles laid down by Lord *Hardwicke* in *Hill* v. *The Bishop of London*. (*b*) The conclusion to which Lord *Hardwicke* comes is, that the question whether there is or is not a resulting trust must depend upon the intention of the grantor. "No general rule," he observes, "is to be laid down, unless where a real estate is devised to be sold for payment of debts, and no more is said; there it is clearly a resulting trust, but if any particular reason occurs why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the Court to say it shall not be a beneficial interest."

Let us consider what was the intention of the grantor of this deed. The father, being upwards of eighty years of age, executes a deed, which recites, that he was desirous of settling the property to which he was entitled, therein described, in such manner as to make a provision

(*a*) 1 *V. & B.* 260. (*b*) 1 *Atk.* 618.

1836.

Cook
v.
Hutchinson.

provision for himself during his life, and for his wife and children after his death, and for such other purposes as were thereinafter expressed. This was the object he had in view; this was his intention as expressed in the instrument. He proceeds to make a release and assignment of the property comprised in the deed, to his son, "upon the trusts thereinafter declared concerning the same;" and when he comes to declare those trusts, he does not exhaust the whole of the property. But I am of opinion that this is immaterial; for, after having carefully looked through the whole of this deed, I have come to the conclusion, considering the relation between the parties, and the object and purport of the instrument, that the father intended to part with all beneficial interest in the property, and that he meant his son to have the benefit of that part of the property of which the trusts are not expressly declared.

After this deed was executed, the son took possession of the property, and carried on the business of the farm, the father occupying an adjoining cottage with his wife and niece. It is stated in the bill that, during the son's life, the father was supplied by his son with all necessaries; not only was he supplied with all necessaries, but it appears that the son supported his mother and the niece, and furnished accommodation for the numerous friends by whom his father was frequently visited. The Court will not decree an account of the arrears of the wife's pin-money, where the wife has been suitably maintained by her husband, on the presumption that she waived her claim in consideration of the support she received; and the present case admits of presumptions of the like kind. During a period of fifteen years and a half, until the death of the son, it does not appear that any account of interest was demanded

KING'S COLLEGE LIBRARY

1836.

COOK
v.
HUTCHINSON.

manded or given, or that there was the least dissatisfaction on the part of the father, or the least desire to have such an account. Under these circumstances, it is impossible that that part of the bill which seeks an account of interest, and of the profits of the farming business during the son's life, can be sustained.

The son died in *November* 1832, and in *January* 1833 the executors obtained from the father a receipt for the sum of one pound in full of all demands for arrears of interest upon the estate of the son. In *August* 1833 the father made his will, by which he bequeathed all his personal property to his wife for her life, and after her decease to the Plaintiff *Elizabeth Davison*; and shortly afterwards the original bill was filed, and upon the death of the father in *April* 1834, the suit was revived. The transaction between the executors of the son and the father was, no doubt, an irregular proceeding; but, upon the whole of the evidence, and considering the rights of the parties at the time the receipt was signed by the father, nothing like a surprise, or attempt to take an unfair advantage of the old man, is established. On the contrary, the evidence of *Margaret Davison*, one of the witnesses for the Plaintiff, though relied upon for a different purpose, shews that great care was taken to make the old man understand the nature of the transaction; and here it is impossible to pass over without observation the sort of evidence which has been resorted to on the part of the Plaintiffs in this case. A boy, only fourteen years of age, was examined as to his opinion and belief upon matters on which men of mature age and experience could alone be capable of answering, — on which it was impossible that any true or accurate answer could be obtained, — and which ought never to have been made the subject of interrogatories to that witness.

The

1836.

COOK v. HUTCHINSON.

The bill, so far as it seeks an account of interest and the profits of the farm from the time of the execution of the deed till the death of the son, must be dismissed with costs; but the Plaintiffs are entitled to an account of the capital, and to have their respective interests secured in respect of the property comprised in the deed, and to an account of the interest from the son's death to the death of the father, and of such property and farming stock as have been sold by the executors of the son.

BAILEY *v.* GUNDRY.

Feb. 23.

Upon a *subpœna* issued for the costs of a Defendant, against whom the bill had been dismissed, the Plaintiff could not be found at the place where she was decribed as residing in the bill, and no information as to her place of residence could be obtained from her solicitor.

On a motion made on the part of the Defendants who continued on the record, and who were threatened by the Plaintiff's solicitor with an attachment for want of an answer to the amended bill, the Plaintiff was ordered to find security for costs.

A bond in the increased penalty of 100*l.*, as required by the 40th of the New Orders, is to be given in all cases where security for costs is required by the Court.

MR. *BLUNT* moved that the Plaintiff might be ordered to give security for costs, according to the course of the Court, by bond in the penalty of 100*l.* before the Defendants *William Gundry* and *William Poole*, or either of them, should be obliged to put in their answer to the Plaintiff's amended bill. The application was made under the following circumstances. The Plaintiff, *Rebecca Bailey*, was described as of *Weymouth*, in the county of *Dorset*, in the original bill, which was filed on the 6th of *November* 1834, against *William Gundry*, *William Poole*, *Peter Gundry*, and two other Defendants. The Plaintiff, after answer, obtained on the 13th of *May* 1835 an order to amend the bill, by striking out the name of *Peter Gundry* as a Defendant, on payment of costs, which were subsequently taxed at 14*l.* 9*s.* 7*d.* The bill was amended in pursuance of this order; and on the 21st of *October* 1835 the Plaintiff obtained another order

1836.

BAILEY v. GUNDRY.

order to amend, and the Plaintiff was described in the same manner in the amended as in the original bill.

The Plaintiff's solicitor having received no instructions to pay the costs of the Defendant *Peter Gundry*, a subpœna for costs issued on the 26th of *November*. The Plaintiff could not be found at *Weymouth*, and no information as to her place of residence could be obtained from her solicitor. At the same time the Plaintiff's solicitor was threatening the Defendants, who continued upon the record, with an attachment for not having answered the amended bill.

Weeks v. *Cole* (*a*), and *Sandys* v. *Long* (*b*), were cited in support of the application.

Mr. *Cooke*, *contra*, contended that the present application was unsupported by any authority. *Sandys* v. *Long* did not apply; for there the Plaintiff had described himself as of a place where he did not reside, and it was not pretended in the present case that the Plaintiff's place of residence was not correctly described in the bill. The general rule was, that a Plaintiff must appear to be resident abroad at the time of filing the bill; *Green* v. *Charnock* (*c*); and the mere fact of a Plaintiff having gone abroad since the filing of the bill was not a sufficient ground for compelling him to give security for costs; *Hoby* v. *Hitchcock* (*d*); *Anon.* (*e*) In this case, however, it was distinctly sworn that the Plaintiff was not out of the jurisdiction. If the Plaintiff had even become insolvent since the filing of the bill, the Court had no authority to compel him to give security for costs. It was, moreover,

(*a*) 14 *Ves.* 518.
(*b*) 2 *Mylne & Keen*, 487.
(*c*) 3 *Bro. C. C.* 371.
(*d*) 5 *Ves.* 699.
(*e*) 2 *Dick.* 775.

over, to be borne in mind that, against the Defendants who made this application, the Plaintiff was in no default whatever. The Plaintiff would, at any rate, not come within the 40th of the New Orders of 1828, which increased the penalty in the bond to be given as a security to answer costs from 40*l.* to 100*l.*; for that order applied only to Plaintiffs out of the jurisdiction of the Court.

The MASTER *of the* ROLLS.

The ground upon which the Defendants ask for this order is, that, if they should acquire a right to costs, they are liable to be placed in the same difficulty in which the concealment of the Plaintiff's residence, and the refusal of her solicitor to tell where she is to be found, have placed the party who has been dismissed and who is entitled to costs. I think I must make the order. This case is quite different from that of a person going abroad for an occasional purpose, or from that of a Plaintiff who has become insolvent. In the case of an insolvent Plaintiff, the party, though insolvent, is here, and amenable to the authority of the Court, and may suffer personally the consequences of his inability to pay costs. This is the case of a Plaintiff who has absconded, of whose place of residence all knowledge is denied by her solicitor, and who is trying to escape the personal consequences of not obeying the orders of the Court.

The 40th of the New Orders of 1828, increasing the penal sum in the bond to be given as a security for costs from 40*l.* to 100*l.*, is confined to cases in which Plaintiffs are out of the jurisdiction of the Court; and I doubt whether the Court has authority, under that

 order,

1836.

BAILEY v. GUNDRY.

order, to increase the penalty in any other case where security for costs may be ordered.

March 12. On a subsequent day Mr. *Addis*, on the part of the two other Defendants remaining on the record (not having been heard when the motion on the part of the Defendants *Gundry* and *Poole* was made), submitted that the penal sum in the bond to be given as a security for costs ought to be 100*l.* in all cases where security for costs was required by the Court; and he referred to the late case of *Sandys* v. *Long* (*a*), before Lord *Lyndhurst*, and to the order made in that case by the Vice-Chancellor, where the amount of the security required was in conformity with the fortieth New Order. At the time when the fortieth New Order was made, the only cases in which security for costs was required by the Court were cases in which the Plaintiffs were out of the jurisdiction; and it was consistent with the reason, if not with the exact letter of that order, that when security for costs was required in other cases, the same increased amount of security should be given. There were four Defendants in the present case; and a penalty of 40*l.*, to be divided, in case of default, among four persons, (for only one penalty could be recovered, *Lowndes* v. *Robertson* (*b*),) was, for any practical purpose of security, nugatory.

The MASTER *of the* ROLLS said it was desirable that the rule should be uniform, and he would inquire into the practice which had been adopted in the other Court.

March 28. This day his Lordship said that, besides the case of *Sandys* v. *Long*, which had been referred to at the bar, where,

(*a*) 2 *Mylne & Keen*, 487. (*b*) 4 *Mad.* 465.

1836.

BAILEY v. GUNDRY.

where, it was to be observed, there was no question as to the amount of the security, he had, after inquiry, been furnished with orders made in two other cases, where the Plaintiffs were not out of the jurisdiction, in which the amount of the security was in the increased sum required by the fortieth of the New Orders; but it did not appear that in any of the cases in which those orders were made, the amount of the security was in question between the parties. In *Gage* v. *Lady Stafford* (*a*), Lord *Hardwicke* observed, that the sum of 40*l.*, as a security for costs, was very low, and that the Court had often taken notice of the lowness of it, but there was no instance in which the Court had increased it by its authority, though this had been done upon terms. Lord *Hardwicke* thought this matter should be discretionary, and he increased the amount in that case upon certain terms. In *Ogilvie* v. *Hearne* (*b*) Lord *Eldon* expressed his dissent from Lord *Hardwicke*'s opinion that this matter should be discretionary in the Court.

Considering, however, that security for costs had, before the date of the fortieth New Order, been required only in cases where the Plaintiff was out of the jurisdiction, and that, by a reasonable analogy, that order might be extended to other cases, his Lordship thought the rule might be laid down that a bond in the penal sum of 100*l.* should be given in all cases where security for costs was required. The Lord Chancellor, whom he had consulted on the point, concurred in that opinion.

(*a*) 2 *Ves.* sen. 556. (*b*) 11 *Ves.* 598.

1836.

Feb. 25.

VAUGHAN *v.* FOAKES.

A testatrix gave the residue of her property to *A.*, and by a codicil, reciting that gift, and that, as life was uncertain, *A.* might be removed before her, she in such case appointed *B.* and *C.* her residuary legatees. The testatrix made a second codicil, as follows:—"As the death of Mrs. *W.* (the mother of *B.* and *C.*) has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to Mrs. *H.*:" Held, that *A.* was entitled to the residue.

MARY JAMES, by her will dated the 3d of *March* 1830, gave and bequeathed to the Plaintiff, *Ann Vaughan*, the whole of her 4 per cent. annuities upon the trusts thereinafter mentioned, and, after giving several legacies, she bequeathed the residue of her estate and effects, after payment of her personal and testamentary expences and debts, to her kind, affectionate, and never-failing friend, Mrs. *Ann Vaughan*. And she appointed the Plaintiff and *John Finlay* executors of her will.

The testatrix made a codicil to her will, dated the 3d of *May* 1830, which was in the following words:—"In my last will, made the 3d of *March* 1830, I leave my invaluable friend, Mrs. *Ann Vaughan*, my joint trustee and executrix with Mr. *John Finlay*, and, after the payment of sundry legacies and expences, I leave the same-named Mrs. *Ann Vaughan* my residuary legatee. Now, as life is very uncertain, and the above-named Mrs. *Ann Vaughan* may be removed before me, this is my will and resolve, that in such case I appoint *Rosa* and *Arthur Warren*, the children of the late Mrs. *Warren*, to be my residuary legatees, share and share alike, or to the survivor, in which case and for which purpose I appoint *Biddulph*, *Cocks*, and Co., bankers, trustees of the said *Rosa* and *Arthur Warren* share and share alike as above mentioned. I consider this as a codicil to my will of the 3d of *March* 1830."

The testatrix made a second codicil to her will, dated the 2d of *February* 1831, which was in the following words:

1836.

VAUGHAN v. FOAKES.

words: — "This is a further codicil to my one above. In addition to the 200*l.* left in my will to Mrs. *Isabella Argus*, I direct my trustees or executors to give Mrs. *Isabella Argus* the additional sum of 100*l.* And as the death of Mrs. *Rosina Jane Warren* has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to Mrs. *Hays.*

The testatrix died shortly after the date of the last codicil, and *John Finlay* alone proved her will. *John Finlay* paid the debts and legacies of the testatrix, and, after such payment, a residue of 838*l.* remained in his hands. He died in *December* 1831, having appointed the Defendants, *John Foakes* and *Rowland Winbore*, his executors, and *Ann Vaughan* shortly afterwards proved the will and codicils of the testatrix.

The bill was filed by *Ann Vaughan*, who claimed to be entitled to the residuary estate of the testatrix, against the executors of *Finlay*, and the children named in the first codicil; and the question was whether the codicils operated as a revocation of the gift of the residue to the Plaintiff in the will.

Mr. *Pemberton* and Mr. *Hetherington*, for the Plaintiff.

There can be no doubt, from the affectionate terms which the testatrix uses with respect to Mrs. *Vaughan*, that the Plaintiff was the person to whom she was chiefly desirous of leaving the residue of her property. In her first codicil the testatrix contemplating the uncertainty of life, after reciting that she had appointed the Plaintiff her residuary legatee, provides that, in case the Plaintiff should die in her lifetime, the two children named in the codicil should be entitled to the residue of her property. In the second codicil she misrecites

1836.

VAUGHAN v. FOAKES.

recites the effect of the prior codicil, stating, as a reason for giving to a person therein named a legacy which had lapsed by the death of the mother of the two children named in the first codicil, that those children would ultimately become her residuary legatees. The question is, whether this misrecital can affect the previous disposition in favour of the Plaintiff.

A recital of a gift, where a testator has before given nothing, may amount to a gift by implication; but a recital under an erroneous conception of the thing supposed to have been given will not alter the nature of the subject referred to, nor of itself operate a gift. This distinction is taken by Sir *William Grant*, with his accustomed clearness and discrimination, in *Smith* v. *Fitzgerald.* (*a*) Speaking of the recital in that case, Sir *William Grant* observes: "It refers to something as already given; something that he had given, or supposed that he had given. If, in the preceding part, there was nothing that could in any way answer the description of what he here says he had willed to them, there would then be room for the application of the doctrine that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given." Applying this test to the present case, it is plain that the recital in the second codicil is a mere inaccurate description of the contingent interest given to the children of Mrs. *Warren* in the first codicil; and the effect of holding this recital to be equivalent to a gift to those children would be to disappoint the clear intention of the testatrix in favour of the Plaintiff.

Mr.

(*a*) *3 V. & B. 2.*

1836.

VAUGHAN v. FOAKES.

Mr. *Kindersley* and Mr. *Stinton*, *contra*.

The doubt as to the intention of the testatrix was so strongly felt by the Plaintiff herself before the death of the co-executor, that she expressed her readiness to give up her claim to the principal in favour of the children of Mrs. *Warren*, reserving to herself a life-interest only in the residuary fund; and a deed was actually prepared for the purpose of carrying her expressed intention into effect. The two codicils may consist with each other by giving the interest of the residue to the Plaintiff, and the capital at her decease to the children of Mrs. *Warren*, and the word "ultimately" supports that construction. That the testatrix intended to give an absolute interest in her residuary property to those children is clear, for she gives away to another person the legacy which had lapsed by the death of their mother expressly upon that ground. Where the intention is clear, the Court has held a recital to be equivalent to an appointment: *Poulson* v. *Wellington* (*a*); and it has not only held a recital to amount to a gift, but supplied words of limitation where such words appeared to have been omitted by mistake: *Bibin* v. *Walker*. (*b*)

The MASTER *of the* ROLLS.

I have no doubt as to the construction to be put upon these codicils. All the cases of this kind depend upon their own peculiar circumstances; a recital of what a testator had done, or supposed he had done, may amount to a gift; and, for the purpose of ascertaining the effect of the recital, we must look to the whole instrument. In this case the testatrix gives the residue of her property to the Plaintiff by her will; and by a codicil

(*a*) 2 *P. Wms.* 533. (*b*) *Ambl.* 661.

1836.
VAUGHAN
v.
FOAKES.

codicil reciting that gift, and contemplating the uncertainty of life, and the possibility that Mrs. *Vaughan* might be removed before her, she appoints in such case the two children of Mrs. *Warren* her residuary legatees. So far there is no doubt of the construction; but then comes the codicil which she expressly describes as an addition, not to the will, but to the prior codicil, which prior codicil made a contingent gift to the children of Mrs. *Warren* in the event of Mrs. *Vaughan* dying in the lifetime of the testatrix. This further codicil, after giving an additional legacy of 100*l.*, proceeds in these words: — "As the death of Mrs. *Rosina Jane Warren* has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to Mrs. *Hays*."

The question is, whether this amounts to evidence of an intention to make any gift to the children of Mrs. *Warren* other than that which she had previously made by her first codicil. I cannot say that it does. There is a misrecital of what she had previously given, — she recites that as an absolute, which was only a contingent gift; if the word "may" had been used instead of "will" the recital would have been in exact conformity with the prior gift. As by the prior codicil she had conferred the gift of the residue of her property on the Plaintiff, and as there is no question as to that codicil, I am of opinion that the Plaintiff is entitled to the decree prayed by her bill.

1836.

MALCOLM *v.* CHARLESWORTH.

Feb. 15, 16.

An assignment of a legacy charged upon land is an assignment of money only, and does not affect the land within the meaning of the registry acts. The registration of such an assignment, therefore, does not postpone a prior unregistered assignment of the same legacy.

EDWARD MANNERS, by his will, dated the 5th of *March* 1801, devised all his manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever to *Ann Stafford* and her assigns for her life; and, after her decease, he devised all his real estates whatsoever unto his ten children therein named and their heirs, subject to the payment of 12,000*l.* thereinafter given and bequeathed to *Roosilia Thorston* and *Harriot Thorston;* and, after providing for the event of his children dying under twenty-one, and without issue, the testator proceeded as follows:—"I give and bequeath unto *Roosilia Thorston* and *Harriot Thorston* the sum of 12,000*l.*, to be equally divided between them, share and share alike; and in case either of them shall happen to die before they shall attain the age of twenty-one years, and unmarried, then my mind and will is that the share of her so dying shall go and be paid to the survivor of them. And I do hereby charge all my messuages, farms, lands, tenements, and hereditaments in *Goadby*, otherwise *Goadby Marwood*, and *Kirby Bellars*, otherwise *Kirkby Bellars*, in the county of *Leicester*, and in the county of *York*, after the decease of *Ann Stafford*, with the payment of the said sum of 12,000*l.* by me given and bequeathed unto *Roosilia Thorston* and *Harriot Thorston.*

The testator died in the year 1811, leaving *Ann Stafford*, the ten children named in the will, who all lived to attain the age of twenty-one years, and *Roosilia Thorston* and *Harriot Thorston*, surviving him.

Roosilia

1836.

MALCOLM v. CHARLESWORTH.

Roosilia Thorston attained the age of twenty-one years, and afterwards intermarried with *Edward Archdeacon*. *Harriot Thorston* also attained the age of twenty-one years in 1810, and intermarried with *John Byng Wilkinson*, who was afterwards appointed paymaster of the 10th regiment of Royal Hussars.

On the appointment of *John Byng Wilkinson* to the office of paymaster, *James Wilkinson* entered into a bond for the payment of 1000*l.* to secure the faithful discharge by *John Byng Wilkinson* of his duties in that office; and by an indenture dated the 2d of *August* 1813, between *John Byng Wilkinson* of the one part, and *Thomas William Hill* and *James Wilkinson* of the other part, reciting that *James Wilkinson* had entered into such bond, that *John Byng Wilkinson* was indebted to his father, *John Wilkinson*, in the sum of 561*l.* 14*s.*, and that his father was also surety for him in a bond for 500*l.*, and that *John Byng Wilkinson* was desirous of securing the payment of such monies, and also of making some provision for his wife, *Harriot Wilkinson*, and his two natural children therein named, it was witnessed that *John Byng Wilkinson* assigned to *Hill* and *James Wilkinson*, their executors, &c., the sum of 6000*l.*, being the moiety of the sum of 12,000*l.* to which *John Byng Wilkinson* was entitled in right of his wife, under the will of *Edward Manners*, after the decease of *Ann Stafford*, in trust as an indemnity to *James Wilkinson* and *John Wilkinson* in respect of the bonds entered into by them respectively, and upon further trust to pay the sum of 561*l.* 14*s.* and interest to *John Wilkinson*, and such further sums as *John Wilkinson* might advance or pay on account of *John Byng Wilkinson*, not exceeding in the whole the sum of 1000*l.*, and interest from the time of advancing the same, and then as concerning the sum of 2000*l.*, part of the said 6000*l.*, upon trust to invest the same

same in government or real securities, and pay the annual proceeds of such securities into the proper hands of *Harriot Wilkinson* for her separate use during her natural life, or to such person as she by any note or writing signed by her, but without anticipation, and without the same being disposed of to any other purpose than her personal maintenance should direct; and after her decease in trust for *Elizabeth Wilson* and *Frances Wilson*, the two natural children of *John Byng Wilkinson*, in equal shares; and as to the residue of the 6000*l.* for the absolute use and benefit of *John Byng Wilkinson.*

In the year 1821 *James Wilkinson* was called upon to pay the sum of 1000*l.* to make good deficiencies in the accounts of *John Byng Wilkinson* as paymaster; and he paid that sum. He died shortly afterwards, having made a will by which he appointed his wife, *Caroline Wilkinson*, his sole executrix.

Ann Stafford, the tenant for life, died in *September* 1827; and shortly after her death the bill was filed by *Caroline Wilkinson*, the personal representative of *James Wilkinson*, against the several parties interested under the will of *Edward Manners*; and it prayed that the sum of 1000*l.*, and interest due in respect of the bond, might be paid to her, and the residue applied in the manner directed by the indenture of the 2d of *August* 1813; or otherwise that the 12,000*l.* might be raised by sale or mortgage out of the devised estates, and that 6000*l.*, part thereof, might be applied in satisfaction of what should be found due to the Plaintiff, and upon the trusts of the indenture of the 2d of *August* 1813, and that the remaining 6000*l.* might be paid to the Defendants entitled thereto.

Caroline Wilkinson afterwards intermarried with *Robert Malcolm*, and the suit was duly revived.

1836.

MALCOLM v. CHARLESWORTH.

Shortly after the marriage of *John Byng Wilkinson* with *Harriot Thorston* a separation took place, and Mrs. *Wilkinson* resumed her maiden name.

On the 30th of *April* 1824 Mrs. *Wilkinson* executed an indenture, purporting to be between *Harriot Thorston*, of *Jermyn Street* in the parish of *St. James*, in the county of *Middlesex*, spinster, of the one part, and the Defendants *William Thompson*, *James Christian Clement Bell*, and *John Chapman*, the trustees of the Reversionary interest Society, of the other part, whereby, after reciting the will of the testator *Edward Manners*, and that *Harriet Thorston* had acquired a vested interest in a moiety of the 12,000*l.* expectant upon the death of *Ann Stafford*, who had attained her sixty-fifth year, and that the Defendants had by their agent, at a public sale by auction, contracted and agreed with *Harriot Thorston* for the absolute purchase (free from all charges, except legacy duty) of her interest in the said sum of 6000*l.*, it was witnessed that, in consideration of the sum of 3350*l.*, paid by the Defendants *Thompson*, *Bell*, and *Chapman* to *Harriot Thorston*, she bargained, sold, and assigned to the said Defendants all the said sum of 6000*l.* bequeathed to her by the will of *Edward Manners*, and to which she was entitled in expectancy on the decease of *Ann Stafford*.

The sum of 3350*l.* was paid to Mrs. *Wilkinson* by Messrs. *Thompson*, *Bell*, and *Chapman*, and a further sum of 67*l.* was afterwards paid to her by those Defendants in consequence of its having been discovered that she was more nearly related to the testator than she had been represented to be by the particulars of sale, and that therefore a smaller legacy duty would be payable upon her legacy.

The

1836.

MALCOLM v. CHARLESWORTH.

The Reversionary interest Society having afterwards discovered that Mrs. *Wilkinson* was a married woman, and that her husband, *John Byng Wilkinson*, was living at *Calais*, entered into a negotiation with *John Byng Wilkinson*; and by an indenture dated the 24th of *July* 1826, and made between *John Byng Wilkinson* of the first part, the Defendants *Thompson*, *Bell*, and *Chapman* of the second part, and *George Stephen*, the solicitor of the Society, of the third part, *John Byng Wilkinson*, in consideration of 500*l.* paid to him by the Defendants, confirmed the assignment made by his wife, and released all his interest in the moiety of the legacy of 12,000*l.*

The Defendants *Thompson*, *Bell*, and *Chapman* stated the above-mentioned facts in their answer; and they further stated that, at the time of the assignment made by Mrs. *Wilkinson*, they had no notice or information that she was a married woman; and that, for the purpose of satisfying their solicitor that she was competent to assign her reversionary interest, she made an affidavit before one of the Masters of the Court, in which she described herself as *Harriot Thorston*, spinster, and swore that she had not directly or indirectly incumbered, or in any way disposed of the 6000*l.*, or any part thereof, and that she was then a single woman and never had been married. The Defendants further stated that they, by their solicitor, caused a search to be made for incumbrances in the North and West Ridings of *York* before the purchase was completed; and that, after the purchase, they caused a memorial of the indenture of the 30th of *April* 1824 to be registered in the register office for the North Riding of the county of *York*, in which riding a great part of the testator's estates was situated, and also gave notice to *Ann Stafford* that Miss *Harriot Thorston* had assigned to them her

1836.

MALCOLM v. CHARLESWORTH.

reversionary interest in the 6000*l.* The Defendants submitted that the indentures under which they claimed were, by reason of such registration and notice, entitled to priority over the indenture of the 2d of *August* 1813, so far at least as the testator's lands in the North Riding of the county of *York* were concerned, and they insisted that the last-mentioned indenture was voluntary and without consideration, except so far as *James Wilkinson* and *John Wilkinson* respectively were interested therein.

The questions made in the cause were, whether the registration and notice relied upon by the Reversionary interest Society had the effect of giving priority to the indentures under which they claimed over the indenture of the 2d of *August* 1813; and what, if any, interest Mrs. *Wilkinson* took under the last-mentioned indenture.

Mr. *Pemberton* and Mr. *Monro*, for the Plaintiff, submitted that there was no ground whatever for the claim to priority set up by the answer of the Defendants representing the Reversionary interest Society. The doctrine as to the effect of notice in postponing an equitable incumbrance prior in point of date had already been carried very far, but this was the first attempt which had been made to claim priority on the ground of notice for an instrument in itself perfectly invalid. The Defendants stated in their answer that they had given notice to the tenant for life of the assignment fraudulently made to them; but the tenant for life was in no manner interested in, or bound to act upon such notice. How could notice to the tenant for life of a subsequent fraudulent assignment affect the claims of persons interested, by virtue of a *bonâ fide* prior assignment, in a legacy charged upon the devised estates? As to the registration of the deed by the Defendants, that

that was no notice, even if the deed had been a proper subject of registration; but the registration of an assignment of a sum of money was an act perfectly nugatory, and could not possibly give any advantage to the Defendants.

Mr. *Beames* and Mr. *Garratt*, for the trustees of the Reversionary interest Society.

A gross fraud was, no doubt, practised by Mrs. *Wilkinson* upon the Reversionary interest Society; but a *feme covert* will not be permitted in this Court to take advantage of her own fraud: *Savage* v. *Foster*. (*a*) Whatever interest, therefore, Mrs. *Wilkinson* had in the legacy passed to the Society by her assignment, and the subsequent confirmation for valuable consideration by the husband removes all doubt as to the title of the Society, except as against incumbrancers prior in point of date; and the question as between the Plaintiff and the trustees of the Reversionary interest Society is, whether the deed of the latter ought not, by reason of the registration, and the superior diligence of the trustees, to prevail against the incumbrance of the Plaintiff. The assignment to the Defendants was an assignment of a moiety of a legacy charged upon land; and, being therefore an assignment of an interest in land, it plainly required registration, so far as the land upon which the legacy was charged was situate in the North Riding of *Yorkshire*. The language of the act of 8 *G.* 2. *c.* 6. is, that a memorial of *all* deeds and conveyances by which any lands in the North Riding of the county of *York* may be any way affected in law or in equity may be registered; and in *Scrafton* v. *Quincey* (*b*), where a question was made whether a deed executing a power

(*a*) 9 *Mod.* 35. (*b*) 2 *Ves.* sen. 413.

1836.

MALCOLM v. CHARLESWORTH.

power of appointment was such a deed as required to be registered, it was held to be a deed affecting land, and was postponed to a mortgage made subsequently to it and registered before it. It is true, as Lord *Redesdale* has observed, that the registry is not notice to all intents and purposes, but the meaning and intention of the registry acts is to secure persons taking charges upon estates, and to provide that they shall have that to resort to which will enable them to take with more security: *Bushell* v. *Bushell* (*a*), *Latouche* v. *Lord Dunsany* (*b*), *Underwood* v. *Lord Courtown*. (*c*) If the deed of the 2d of *August* 1813 had been registered, the Reversionary interest Society would have escaped altogether the fraud that was practised upon them. The society, however, is at least entitled to all the benefit they can derive from their superior precaution and diligence. So far as the land upon which the legacy is charged is situate within the North Riding of *Yorkshire*, the registry gives to the Defendants a prior title; and by giving notice, as they did, of the assignment of their *chose in action* as well to the legal tenant of the estate upon which their interest was charged as to the devisees in remainder, they acquired a priority over the plaintiff, who neglected to use the same diligence: *Dearle* v. *Hall* (*d*), *Loveridge* v. *Cooper*. (*e*)

Mr. *Kindersley*, for Mrs. *Wilkinson*, submitted that this suit raised no question between his client and the Reversionary interest Society, and that as between Mrs. *Wilkinson* and the Plaintiff the only question was whether she was not entitled to her equitable settlement out

(*a*) 1 *Sch. & Lef.* 97.
(*b*) 1 *Sch. & Lef.* 157.
(*c*) 2 *Sch. & Lef.* 64.
(*d*) 3 *Russ.* 1.
(*e*) 3 *Russ.* 30.

out of the fund. Nothing that had transpired in this suit could affect Mrs. *Wilkinson*'s right to a settlement. The fraud imputed to her was not in evidence; it appeared only upon an answer which could not be used against her, and it was very possible that the transaction might be capable of a satisfactory explanation. At any rate, whatever might be the equities between Mrs. *Wilkinson* and the Reversionary interest Society, the Court could not determine those equities in the present suit.

Mr. *Tinney*, for other Defendants.

Mr. *Pemberton*, in reply.

There is no authority for the proposition that an assignment of a legacy, or of a part of a legacy charged upon land must be the subject of registration if the land upon which the legacy is charged be in a register county. The object of the Registry Acts is to prevent any person dealing with the lands from being prejudiced by secret incumbrances; but how can any person dealing for these lands be in the least degree affected by any assignment of the legacy of 12,000*l.* which is charged upon them? In *Scrafton* v. *Quincey* the question was not whether an assignment of a sum charged upon land, but whether a deed of appointment affecting the land itself was to be the subject of registration. If an assignment of every legacy charged upon land in a register county must be the subject of registration, so must the assignment of every debt so charged; and if a testator directed his land in a register county to be sold for the payment of his debts, no creditor, according to the doctrine contended for on the other side, could safely deal with his debt by way of assignment, will, or any other instrument, without making it the subject of registration. No question can ever arise between parties

1836.

MALCOLM v. CHARLESWORTH.

having a registered and an unregistered deed, except where the subject of the registered deed is a direct immediate interest affecting the land. The assignment of a legacy charged upon land can never affect the land within the meaning of the registration acts, or by any possibility prejudice the title of a purchaser. There is no evidence before the Court of any actual notice having been given by the Defendants, and it is unnecessary therefore to advert further to that part of the argument.

The MASTER *of the* ROLLS (after stating the facts).

The bill is filed by the personal representative of *James Wilkinson*, for the purpose of having her claim satisfied out of the sum of 6000*l.*, being the moiety of the legacy charged upon the devised estates, and the residue of that sum applied upon the trusts of the indenture of the 2d of *August* 1813; and the Plaintiff's claim is resisted by the Defendants, the trustees of the Reversionary interest Society, upon two grounds. First, it is said that the assignment of the legacy was a deed affecting the land upon which it is charged, and that, as a great part of that land is situate in the North Riding of the county of *York*, the want of registration affects the validity of the deed under which the Plaintiff claims. Next, it is contended that the Defendants are entitled to priority over the Plaintiff, because they gave notice of their assignment to the tenant for life of the estates upon which the legacy is charged, and no such diligence was used by the Plaintiff. I need not advert further to the argument founded upon notice, because, although the point is insisted upon by the Defendants in their answer, there is no evidence of any notice having been given. As to the other point, the only question is, whether the land situate in the county of *York* — for the argument cannot

1836.

MALCOLM v. CHARLESWORTH.

cannot possibly be extended to the land in *Leicestershire* — is to be considered as affected by an assignment of a legacy charged upon the land. It appears to me that the deed under which the Plaintiff claims is not a deed which affects the land; it is an assignment of the money charged upon the land, and of the money only; and if I were to hold that an instrument assigning money charged upon land situate in a register county required registration, I should lay down a rule which certainly has not hitherto been adopted. The Plaintiff is entitled, therefore, to the payment of what is due to him out of this charge in priority to the Reversionary interest Society.

The counsel for Mrs. *Wilkinson* claims, on her behalf, her right to a settlement out of this charge. It must be admitted that she has that right; for, though there is strong reason for believing, it cannot be considered as in proof in this suit that Mrs. *Wilkinson*, by a gross fraud, induced Messrs. *Thompson*, *Bell*, and *Chapman* to take from her the assignment under which they claim, and to pay to her a large sum of money upon a representation which was entirely false. If so gross a fraud were in proof, it would not require cases to shew that a married woman will not be permitted in this Court to take advantage of her own fraud. Whatever inquiry may be asked on behalf of the Reversionary interest Society, which is most likely to bring out the truth, I shall be most willing to accede to.

After some discussion, an inquiry was directed under what circumstances the deeds of the 30th of *April* 1824 and the 24th of *July* 1826 were executed, and a declaration was made that the Plaintiff was entitled to payment out of the 6000*l.* in priority to the Reversionary interest Society,

1836.

MALCOLM v. CHARLESWORTH.

Society, and that Mrs. *Wilkinson* was entitled to a settlement out of the whole fund of 6000*l.* without prejudice to the claim of the Reversionary interest Society; and, inasmuch as the charge to which the Plaintiff was entitled would not exhaust the whole fund, that Mrs. *Wilkinson*'s claim to a settlement out of the residue should be also without prejudice to the claim of the Reversionary interest Society.

March 6.

METCALFE *v.* METCALFE.

A bill of revivor cannot be demurred to for want of a party who was not before the Court at the time of the abatement, although the suit might have been imperfect without such party, for it is not the office of a demurrer to a bill of revivor to correct such imperfection.

A demurrer to a bill on the ground that the Plaintiff has not taken out a prerogative administration cannot be sustained.

ELIZABETH NEWLOVE, widow, by her will directed her real estates, which were subject to a mortgage, to be sold, and the produce of the sale to be divided, after satisfaction of her debts, among her four children, *John Bentley*, her eldest son by her first husband, *Sarah Wilson*, *George Newlove*, and *Mary Metcalfe*.

The original bill was filed by *George Wilson* and *Sarah* his wife, and *George Newlove* against *Richard Metcalfe* the administrator with the will annexed of the testatrix, the two other devisees, and the representative of the mortgagee, for the purpose of having the trusts of the will carried into execution under the direction of the Court. *George Newlove* died intestate in *May* 1823, and administration of his personal estate having been granted to *William Newlove* by the Prerogative Court of the Archbishop of *York*, the suit was revived. *Sarah Wilson* afterwards died, and no administration of her estate was taken out; and the cause was, after her death, heard upon further directions, no representative of her estate being before the Court.

In

1836.

METCALFE v. METCALFE,

In *November* 1827 the Plaintiff *George Wilson* died intestate, and in *August* 1832 administration *ad litem* of his personal estate and effects was granted to *John Metcalfe*, the Plaintiff in the present suit, by the Prerogative Court of the Archbishop of *York*. In *October* 1829, the Plaintiff *William Newlove* died intestate, and administration *ad litem* of his personal estate and effects was also granted to the Plaintiff *John Metcalfe* by the Prerogative Court of the Archbishop of *York*.

The bill prayed that the suit might stand and be revived against the several Defendants, and be put in the same plight and condition against them in all respects as the same was in at the time of the abatement.

A demurrer was put in to the bill, first, for want of parties, inasmuch as there was no personal representative of *Sarah*, the wife of *George Wilson*, before the Court; and, secondly, because the Plaintiff ought, as it was alleged, to have revived the suit by virtue of letters of administration granted by the Prerogative Court of the Archbishop of *Canterbury*, whereas it appeared by the bill that he had only obtained letters of administration from the Prerogative Court of the Archbishop of *York*.

Mr. *Beames* and Mr. *Tamlyn*, in support of the demurrer.

The suit is defective for want of parties, inasmuch as there is no personal representative of *Sarah Wilson* before the Court. It was not enough that, upon her death, her husband was before the Court, and that he had a right to administer to his wife's personal estate, for it was necessary that he should have actually clothed himself with the character of her administrator: *Humphreys*

1836.

METCALFE v. METCALFE.

phreys v. *Humphreys.* (*a*) After the death of the husband, at any rate, it is clear that his representative could not represent the personal estate of *Sarah Wilson.*

The next objection is, that it appears upon this bill that a *York* administration only has been taken out by the Plaintiff instead of an administration granted by the Prerogative Court of the Archbishop of *Canterbury.* The Plaintiff, therefore, is not in a situation to sue for the purpose of having the demand which he claims paid to him. Formerly small sums not exceeding 30*l.* were permitted to be paid out of Court without a prerogative administration: *Docker* v. *Horner* (*b*), *Sweet* v. *Partridge* (*c*); but it is now settled that, however small the amount of the sum, a prerogative administration is indispensable: *Challnor* v. *Murhall* (*d*), *Newman* v. *Hodgson* (*e*), *Thomas* v. *Davies.* (*g*) In *Young* v. *Elworthy* (*h*) Sir *John Leach* decided that a decree for an account could not be drawn up where it appeared that a provincial probate only had been obtained by the executor who instituted the suit, but that a prerogative probate was necessary; and in a subsequent case of *Pearce* v. *Pearce* (*i*) his Honor adhered to that opinion. It

(*a*) 3 *P. Wms.* 349.
(*b*) 3 *Bro. C. C.* 240.
(*c*) 5 *Ves.* 148.
(*d*) 6 *Ves.* 118.
(*e*) 7 *Ves.* 409.
(*g*) 12 *Ves.* 417.
(*h*) 1 *Mylne & Keen*, 215.
(*i*) In *Pearce* v. *Pearce* (*Feb.* 11th 1833), the testator charged his real estates with the payment of such debts as his personal estate should be insufficient to satisfy, and the Plaintiff, who sued as executrix under a provincial probate, had exhausted the personal estate and applied a part of her own funds in the payment of the testator's debts, so that a prerogative probate was unnecessary for the purposes of the decree; but the Master of the Rolls said, though a Plaintiff might sue upon a provincial administration, and the nature of the suit might, as in the case before the Court, render a prerogative administration unnecessary, yet, wherever the object of the suit was to have personal assets administered out of which the Plaintiff, as legal personal representative, might receive money, a prerogative probate or administration must be produced before decree.

It appearing, then, upon this bill that the Plaintiff is not in a condition to take any effectual step in the cause, the Defendants ought not to be vexed by such a suit, and a demurrer will well lie.

Mr. *Daniell, contrà.*

As to the first point, the husband of *Sarah Wilson* was entitled to the rents and profits of the devised estate in his own right, and it was unnecessary to take out administration of his wife's estate upon her decease for the purpose of carrying on the suit. Where a husband omits to take out administration of his deceased wife's personal estate in his lifetime, the husband's representative is entitled to the wife's estate, and though the Ecclesiastical Court will grant administration to the wife's next of kin only, such administrator will be a mere trustee for the husband: *Elliot* v. *Collier.* (*a*) Where a suit abates by the death of a party, and the representative of the deceased party is brought before the Court by a bill of revivor, no demurrer will lie. All that the bill of revivor seeks is to have the suit placed in the same condition in which it was before the abatement, and at the last hearing on further directions there was no representative of the wife before the Court.

As to the other point, there can be no doubt that money cannot be paid out of Court without a prerogative administration, but in this suit no money has ever been paid into Court. The decision in *Young* v. *Elworthy* has been questioned, but that case would establish only that the executor or administrator must be armed with a prerogative probate or administration before the decree is drawn up, and no case has gone the length of deciding that a party cannot commence a suit without a prerogative probate or administration. In *Scarth*

(*a*) 3 *Atk.* 526. *S. C.* 1 *Wils.* 168. and 1 *Ves.* sen. 15.

1836.

METCALFE v. METCALFE.

Scarth v. *The Bishop of London* (*a*) Sir *John Nicholl* observes, that, "as to the rule in the Court of Chancery, the cases only establish that that Court requires a competent probate, and will not direct money to be paid out on a diocesan probate, when the money itself in Court shews that there are *bona notabilia* in divers dioceses, and consequently that a prerogative is the competent probate." When, therefore, it becomes necessary in this suit to pay money out of Court, it will be time enough to take the objection that a prerogative administration out of the Court of the Archbishop of *Canterbury* is indispensable.

Mr. *Beames*, in reply.

If the representative of the wife was a necessary party, the fact of the suit being defective at the hearing on further directions can be no ground for continuing the error in this bill of revivor. It is a mistake to suppose that a bill of revivor is not as liable as any other bill to be demurred to for want of parties. An executor may sue before he has obtained probate, because he is already invested by the testator with a character which gives him a right to institute a suit; but an administrator, who derives no authority from the deceased owner of the property, stands in a different situation, and can only sue when he has obtained such an authority as will enable him effectually to prosecute the suit.

The MASTER *of the* ROLLS.

It does not appear to me that this demurrer can be sustained. It is very true that a prerogative probate or administration must be obtained before money can be paid out of Court, and in *Young* v. *Elworthy* Sir *John Leach* was of opinion that it was necessary to produce a prerogative probate before the decree could be drawn up; but no

(*a*) 1 *Hagg.* 625.

no case has ever gone to the extent that a party cannot commence a suit without a prerogative administration, or that, if he does so, the suit may be stopped by demurrer.

Whether the intestates, to whose estates the Plaintiff has taken out administration, had any goods out of the province of *York* does not appear upon these proceedings. The Plaintiff has obtained such administration as constitutes him the legal personal representative of each of the deceased parties, and though it may become necessary in the progress of the suit that the Plaintiff should obtain a prerogative administration out of the Court of the Archbishop of *Canterbury*, that does not appear to me to be a sufficient reason for saying that this suit should not be permitted to proceed, for the Defendants will have the opportunity of raising the objection by their answer.

As to the objection for want of parties, it is unnecessary at present to consider the question, whether the husband, on the wife's decease, ought to have taken out administration of her personal estate, or whether, upon the husband's decease, administration of the wife's personal estate ought to have been taken out by the husband's administrator, or by any other person who would have been a trustee for the husband, because this is a demurrer to a bill of revivor, and the bill seeks that the suit may be placed in the same plight and condition in all respects which the same was in at the time of the abatement. At the time of the last abatement the wife was not a party to the suit, nor was any personal representative of the wife a party to the suit. It has been argued that, if there was no personal representative of the wife before the Court at the hearing on further directions, that was an error, and that the error ought not to be perpetuated.

1836.
METCALFE
v.
METCALFE.

petuated. I am of opinion that, if the proceedings are imperfect, it is not the office of a demurrer to a bill of revivor to correct the imperfection, or to insist that this bill ought, instead of a common bill of revivor, to have been a bill of revivor and supplement. The Plaintiff is entitled to have his bill put into the same plight and condition in which it was at the time of the abatement, and this demurrer, therefore, must be disallowed; but, as it is a case not altogether free from doubt, without costs.

Feb. 16.

WETHERELL *v.* WILSON.

A testatrix, under a power given by her marriage settlement, bequeathed a sum of stock to trustees in trust to pay the interest to her husband, in order the better to enable him to maintain the children of the marriage until their shares should become assignable to them; and if no children, or none that should live till their shares became assignable, she gave the interest of the fund to her husband for his life, and after his decease the principal to such person or persons as should be her next of kin. There was only one child of the marriage: Held, that this bequest was a trust for the benefit of the child, until the principal should become assignable to the child, and gave no beneficial interest so as to entitle trustees for creditors, to whom the husband had assigned all his personal property, to claim the income or any part of it.

BY a settlement dated the 30th of *December* 1811, and made previously to the marriage of the Plaintiff *Charles Wetherell* and *Charlotte Wilson*, the sum of 6369*l.* 8*s.* 5*d.* 4 per cent. bank annuities was declared to be invested in the names of the trustees, parties thereto, upon trust to pay the dividends to *Charlotte Wilson* during her life for her separate use, and after her decease for such person or persons as she should by will appoint, and in default of and subject to such appointment, and until the same should take effect, to the Plaintiff for his life, and after the decease of the survivor of them to the children of the marriage as the Plaintiff should by will appoint; and in default of such appointment, among the children equally.

The

The marriage took effect, and there was issue of the marriage one child only, the Defendant *Mary Eliza Wetherell*, an infant.

Mrs. *Wetherell*, in pursuance of the power reserved to her by the settlement, made a will by which she appointed the 6369*l.* 8*s.* 5*d.* 4 per cent. bank annuities to the trustees of the settlement, and the survivors or survivor, &c., in trust for all and every the child or children living at her decease, equally to be divided between them, if more than one, and if but one, then the whole for such one child; and to be assigned or transferred to such of them as should be sons at their ages of twenty-one years, and to such of them as should be daughters at their ages of twenty-one years, or marriage, provided such marriage were with the consent of the trustees or trustee for the time being, and of her husband, if he should be living. Provided always, and it was her will and desire that if she should leave more than one child, and any of her children being a daughter or daughters should die under the age of twenty-one years without being or having been married with such consent as aforesaid, or being a son or sons should die under the age of twenty-one years, then the share of every such child of and in the said trust premises should go and accrue to the survivors or survivor, and upon trust that they the said trustees, &c., should in the mean time after her decease pay the income, or the interest, dividends, and annual produce of the share for the time being of each of her said children, whose share should not then be assignable or transferable as aforesaid unto her husband, if he should be living, in order the better to enable him to support, maintain, and educate each such child until his or her share should become assignable or transferable as aforesaid, or he or she should previously die; but in case her

1836.

WETHERELL v. WILSON.

said husband should not be living, then upon trust that they the said trustees or trustee for the time being should, at their or his discretion, pay and apply all or so much of the income, or interest, dividends, and annual produce of the share for the time being of each of her said children, whose share should not then be assignable or transferable for or towards his or her support, maintenance, and education, until such his or her share should become assignable or transferable, or he, she, or they should previously die. Provided always that if in any year or years the said trustees or trustee for the time being should, in pursuance of the last-mentioned trust, pay and apply any sum or sums of money for the maintenance, education, and support of any such child or children which should be less than the interest, dividends, and annual produce to which he, she, or they should be respectively entitled, then the surplus thereof should accumulate and go in augmentation and be assigned and transferred at the same time with the original share or shares; yet so nevertheless that it should be lawful for such trustees or trustee for the time being to pay and apply the surplus and savings of the interest, dividends, and annual produce of the share of any such child in any one preceding year for or towards his or her maintenance, support, and education in any succeeding year; but in case the said testatrix should leave no child being a son who should live to attain the age of twenty-one years, or being a daughter should live to attain that age, or be married with such consent as aforesaid, then in trust to pay the dividends, interest, and annual produce to her said husband for his life, and after his decease in trust for such person or persons as would at the time of her decease have been entitled to her personal estate as her next of kin in case she had died intestate and unmarried.

Mrs.

1836.

WETHERELL v. WILSON.

Mrs. *Wetherell* died in *September* 1830, leaving her husband, the Plaintiff, and *Mary Eliza Wetherell*, her only child, surviving her.

By an indenture dated the 29th of *May* 1833, the Plaintiff assigned to *Henry Tawney* and *James Mivart* all his personal estate in trust for the benefit of his creditors. The infant *Mary Eliza Wetherell* was also entitled to a sum of 13,000*l.* under the will of her grandfather *Thomas Wilson*, and an order had been made, in a suit for the administration of the estate of *Thomas Wilson*, for an allowance of 630*l.* a year, to be paid to the Plaintiff and applied by him according to a scheme to be approved by the Master, for the maintenance and education of his daughter.

The bill was filed by the Plaintiff against the surviving trustees of the settlement, *Mary Eliza Wetherell*, the next of kin of the testatrix, and the trustees for the creditors of the Plaintiff, and it prayed that the dividends of the sum of 6369*l.* 8*s.* 5*d.* 4 per cent. bank annuities might be paid to the Plaintiff during the minority, or until the marriage of his daughter; and the question was, whether the Plaintiff was entitled to receive the dividends as a trustee for the benefit of his daughter only, or whether the dividends or any part of them belonged to him beneficially, and consequently passed to his creditors under the indenture of the 29th of *May* 1833.

Mr. *Pemberton* and Mr. *Piggott*, for the Plaintiff.

The dividends are to be paid by the trustees to the father, "in order the better to enable him to support, maintain, and educate" the child, until the capital shall become assignable. This is a gift for the benefit of the

1836.

WETHERELL v. WILSON.

husband, subject to the application of so much of the dividends as may be required for the maintenance and education of the child. In *Hanley* v. *Gilbert* (*a*), the testatrix directed the residue of the monies arising from her estate to be paid to her niece, and to be expended by her at her discretion for or towards the education of her (the niece's) son, and that she should not be liable at any time to account to her son, or any other person, for the disposal or application of such residue; and the Court held, that the niece was entitled to the residue, subject to the application of so much as the Court might think fit for the education of the son during his minority. The father is legally bound to maintain his child, and the object of this bequest is to relieve him from a part of the burthen of that legal liability. In the actual circumstances of the father, it may become necessary that the whole income of this fund should be applied to the maintenance and education of the child; and while the trust for the benefit of the child attaches upon it, the creditors can have no claim to it as part of the personal property of the husband.

Mr. *Kindersley* and Mr. *Cooper*, for the infant, cited *Andrews* v. *Partington* (*b*), *Brown* v. *Casamajor* (*c*), *Hammond* v. *Neame* (*d*), and *Benson* v. *Whittam*. (*e*)

Mr. *Spence* and Mr. *Toller*, for the trustees under the will.

Mr. *Tinney* and Mr. *Parker*, for the trustees for the creditors of the husband.

This is an absolute gift of the interest for the benefit of the father, until the capital shall become assignable, and

(*a*) *Jac.* 354.
(*b*) 3 *Bro. C. C.* 60.
(*c*) 4 *Ves.* 498.
(*d*) 1 *Swanst.* 35.
(*e*) 5 *Sim.* 22.

1836.

WETHERELL v. WILSON.

and not a gift for the benefit of the child. The expressed trust is for the father, though the motive assigned for the gift is the support of the children. The trustees are to pay the interest to the husband, in order the better to enable him to maintain his children; and is he not better enabled to maintain his children by the additional income which he so acquires? There is no reasonable ground for contending that the testatrix, by these words, meant that the father should apply every farthing of the income to the benefit of the children. In *Hammond* v. *Neame* (*a*), the testator bequeathed stock to a trustee for and towards the maintenance and education of the children of his niece *H.* until they should attain twenty-one, and then in trust to transfer the principal equally among the children, with a bequest over, in default of such issue, to the nephews and nieces of the testator living at the death of *H.* The niece had no child, but she was, nevertheless, held to be entitled to the dividends for her life, for it was substantially an immediate bequest of the dividends to the niece, the children not being the direct objects of bounty, but only the occasion of bounty. So in this case, the children were the occasion of bounty to the father, and if the father would have been entitled to the income for his life, even if there had been no child, it is clear that he must have a beneficial interest. A mere motive for a gift will not constitute a trust; *Benson* v. *Whittam.* (*b*) The gift, therefore, in this case, must be considered as a bounty to the father, not a trust for the child. If bounty to the father, it constitutes part of his personal property, and will pass by the assignment of his personal property to the trustees for the creditors. Where a gift is made to trustees for the maintenance of a child, the general rule of the Court is, that if the father is of ability to maintain the

(*a*) 1 *Swanst.* 35. (*b*) 5 *Sim.* 22.

1836.

WETHERELL v. WILSON.

the child, the gift shall accumulate for the child's benefit. But if it be an immediate gift to the father for the maintenance of the child, the father takes it without reference to his ability to maintain the child. *Hughes* v. *Hughes* (*a*), *Andrews* v. *Partington*. (*b*) *Hanley* v. *Gilbert* was a case of express trust; and in *Brown* v. *Casamajor* (*c*), which was the case of a gift made to a father, the better to enable him to provide for his younger children, the father was held to be entitled to the interest for his own use and benefit during the minority of the children.

Mr. *Pemberton*, in reply.

The MASTER *of the* ROLLS (after stating the case).

Upon this will it is argued, that the testatrix intended to give the income of the fund to the father, not for the benefit of the children, but for his own use, and that the creditors of the father, for whose benefit he has assigned to trustees all his personal property, are consequently entitled to it. It is impossible for me to entertain any doubt that the testatrix intended the income to be applied to the benefit of the children. There is no occasion in this case to direct a reference to the Master to inquire into the ability of the father to maintain the child, or as to the manner in which the money is to be paid and applied, because the testatrix has sufficiently indicated her intention in that respect. Declare that the father is entitled to have the income paid to him by the trustees, and that he is bound to apply it for the benefit of the child; and that he is, therefore, not at liberty to assign it over to the creditors, or to any other persons or person without regard to the interests of the child.

(*a*) 1 *Bro. C. C.* 387.
(*b*) 3 *Bro. C. C.* 60., and 2 *Cox*, 223.
(*c*) 4 *Ves.* 498.

1836.

VERCHILD *v.* PAULL.

March 7.

THE bill was filed by parties claiming the equity of redemption of certain estates, situate in the island of *St. Christopher*, against the Defendants *Paull* and *Burt* (the latter being out of the jurisdiction), as mortgagees in possession; and it prayed for an account, and that the mortgaged premises might be redeemed. The bill contained an allegation that, soon after the death of the testator, *Lewis Brotherson Verchild*, under whom the Plaintiffs claimed, the Defendants entered into the possession or receipt of the profits, produce, and consignments of the plantation in question, and that they had ever since been, and then were, in such possession or receipt.

The bill was filed for an account by Plaintiffs claiming to be entitled to the equity of redemption of certain estates in the island of *St. Christopher* against the Defendants as mortgagees. The Defendants pleaded that they were owners of the estates in question under a bill of sale, which, according to the laws of the island of *St. Christopher*, vested the absolute interest in the premises in the Defendants.

The Defendant *Paull* put in a plea, by which he stated that the Defendant *Burt* had obtained, in the Court of King's Bench and Common Pleas, in the island of *St. Christopher*, a judgment by confession of the executors of the testator, *Lewis Brotherson Verchild*, for the sum of 3435*l.*, being the penalty of a bond given by the testator; that upon that judgment a writ of execution issued, directed to the provost marshal of the island, commanding him to levy of the goods and chattels, lands and tenements, of the testator in the hands of the executors, sufficient to satisfy the said debt and costs; that such execution had been levied; that the estate in question had been duly sold by public auction,

The bill charged that the Defendants, shortly after the death of the testator under whom the Plaintiffs claimed, entered into possession or receipt of the rents and profits of the estates in question. The Defendants, by their plea, stated that they entered into possession or receipt of the rents and profits after, and not before, the sale. This allegation of the Defendants did not over-rule the plea.

1836.

VERCHILD v. PAULL.

auction, at which the Defendant *Burt* attended, and bid for and on the part of the Defendant *Paull*, the sum of 3566*l.*, which was the highest bidding; that it was afterwards agreed that such bidding should be taken to have been made for the firm of the Defendants Messrs. *Paull* and *Burt*; that, upon payment by the Defendant *Burt* to the provost-marshal, of the difference between the purchase-money and the sum due to *Burt* in respect of the judgment, a bill of sale was executed by the provost-marshal, by which all right and interest in the plantation in question was absolutely conveyed to the Defendants. The plea further stated, that the Defendants entered into possession of the plantation after, and not before, the sale, and that under and by virtue of the judgment and the proceedings under the same, and the bill of sale, the plantation in question was, according to the laws then in force in the island of *St. Christopher*, vested in the Defendants, their heirs, executors, and administrators.

Mr. *Pemberton* and Mr. *Garratt*, in support of the plea.

This bill is filed, for the purpose of redeeming an estate in the island of *St. Christopher*, against the Defendants who are alleged to be mortgagees, the estate in question having, by virtue of certain proceedings had in the island, become irredeemable, and the Defendants being, in fact, the absolute owners of the estate. The legal effect of the proceedings stated in the plea, being matter of foreign law, is, of course, considered in this Court as a fact, and is, therefore, well pleaded as a bar to the relief sought by the bill.

Mr. *Kindersley* and Mr. *Koe*, *contrà*, contended, that this plea could not operate as a bar, either upon the merits,

1836.

VERCHILD v. PAULL.

merits, or in point of form. The plea was wholly silent as to the mortgage. The executors were not trustees, for distinct trustees of the real estate had been appointed by the will of the testator. The plea contained no allegation that the lands were in the hands of the executors, nor was there any distinct allegation what the particular law of the island was. Foreign law was, no doubt, considered as fact in this Court; and, therefore, it must be stated as distinctly in a plea as any other fact. The plea admitted that the Defendants had taken possession after the sale, but it contained no allegation that they had not been in the receipt of the rents and profits before the sale. The plea was, moreover, defective in point of form. Facts which must have been within the knowledge of the Defendants were stated as matter of belief; a mode of pleading which could be allowed only in the case of a negative plea, or where the transactions of other persons were referred to. *Drew* v. *Drew*. (*a*) Thus it was stated that *Burt* did, as the Defendant *Paull* believed, attend the sale and bid on the Defendant *Paull*'s behalf. Now *Burt*'s attending the sale might be matter of belief only, but *Paull* must know whether the bidding was on his own behalf or not.

Another objection in point of form was, that the plea tendered two issues, and was besides over-ruled by a partial discovery of the matters inquired into by the bill. The bill alleged that, shortly after the testator's death, the Defendants entered into possession or receipt of the rents and profits. One issue tendered by the plea was, that the Defendants became entitled to the whole interest in the estate by the bill of sale. Another issue tendered

(*a*) 2 *V. & B.* 159.

1836.

VERCHILD v. PAULL.

tendered by the plea was, that the Defendants entered into possession or receipt of the rents and profits after and not before the sale, one of the matters of which discovery was sought by the bill, being the time of entering into possession or receipt of the rents and profits. The plea was, therefore, over-ruled by the discovery, a point which had been determined by the case of *Robertson* v. *Lubbock*. (*a*)

The MASTER *of the* ROLLS had no doubt that the plea was good in substance, nor did he think that the validity of the plea was affected by the first objection which had been taken in point of form, but his Lordship wished to hear the reply as to the objection that the plea was over-ruled by answering.

Mr. *Pemberton*, as to that point, said, that if the objection were to prevail, no plea could ever be successfully filed. A plaintiff, knowing that there was a bar by way of plea to the relief sought, had only to put into his bill such charges and interrogatories as must comprise the matter of the defence; and the defendant would be held to have over-ruled his plea, if he made, what he necessarily must make, the answer to such charges and interrogatories. Take, for instance, the case of a plea of purchase for valuable consideration without notice. The plaintiff, in his bill, anticipates the defence, and charges that no such deed was ever executed; that, if it was executed, no consideration passed; that, if there was any consideration, it was not paid at the time the deed was executed, and that, if it was paid at that or any other time, it was afterwards returned; and finally, that, if the deed was executed for valuable

(*a*) 4 *Sim.* 161.

1836.

VERCHILD v. PAULL.

valuable consideration *bonâ fide* paid, the Defendant had notice. The form of a plea in such a case was, that the Defendant executed a deed on such a day, that consideration was duly paid, and that he had no notice. This plea necessarily involved answers to various matters inquired into by the bill, but would it not be against all reason to contend that the plea was on that account over-ruled? Every thing which constituted, or was essential to the defence made by a plea, must be stated, whether the discovery of such particulars was sought by the bill or not. In the present case, the bill having claimed an account against the Defendants in respect of their possession of the estate in question as mortgagees, the defence made by the plea was that the Defendants had obtained an irredeemable title, and that their possession had been according to their title. The allegation that they had entered into possession after, and not before the sale, was of the essence of the defence, and it mattered not whether the time of entering into possession had or had not been interrogated to by the bill. The objection taken to the substance of the plea was, that though the Defendants had admitted that they were in possession after the sale, they had not stated that they were not in receipt of the rents and profits before the sale. The objection taken to the form of the plea was, that in stating that, which as matter of substance was complained of as too little, they had stated too much. The objection, taken in point of substance, was, that the information disclosed was deficient; the objection taken in point of form, that that same information was excessive. The answer to these inconsistent objections was, that the allegation in the plea was made, not for the purpose of discovering any thing inquired into by the bill, but for the purpose of stating a matter essential to the defence, namely, that the

1836.

VERCHILD *v.* PAULL.

the possession of the Defendants had been according to their title.

The MASTER *of the* ROLLS allowed the plea, and gave liberty to the Plaintiffs to amend their bill.

March 9, 10.

MILES *v.* CLARK.

A testatrix made the following bequest: — "I give to *A. A.* the sum of 400*l.*, to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between *E. M.* and *A. M.*" *A. A.* took a life-interest only in the legacy.

CATHERINE LANE, by her will, dated the 22d of *January* 1830, bequeathed the sum of 2500*l.* 3½ per cent. reduced bank annuities, to her executors upon trust, to pay the interest and dividends thereof to *Amelia Miles* during her life, for her separate use, and, after the decease of *Amelia Miles*, she directed the said sum to be distributed among the children of *Amelia Miles* in the following manner: — to *Arthur Fellenberg Miles* 400*l.*; to *Sarah Louisa Miles* 350*l.*; to *Frances Utritia Miles* 350*l.*; to *Edwin Delabere Miles* 350*l.*; to *Eugenia Caroline Miles* 350*l.*; to *Emma Jeannette Miles* 350*l.*; and to *Edward Payne Miles* 350*l.*; the said respective sums to be paid to the children when they should severally attain the age of twenty-one years, and if any of them should die before they attained that age, the shares of the children so dying to go to the survivors. And the testatrix gave the sum of 500*l.* 3½ per cent reduced bank annuities, to her executors upon trust to pay the interest and dividends thereof to her brother *William Edward Hughes Allen* for his life, and after his death to *Eleanor Birnie Allen*, his wife, for her life; and after the death of the survivor of them, she gave the said sum of 500*l.* stock to the children of *William Edward*

1836.
MILES
v.
CLARK.

ward Hughes Allen and his wife, in manner therein mentioned. The testatrix also bequeathed by her will divers specific legacies, consisting of pictures, jewels, and other ornaments, some of which were given to *William Edward Hughes Allen* and his wife, and their children.

The testatrix made a codicil to her will, dated the 14th of *February* 1831, in the following words: — "I hereby revoke the bequest of 500*l.* bequeathed by my will to *William Edward Hughes Allen*, and hereby revoke every sum or sums of money given by my said will to *Eleanor Birnie*, wife of the said *William Edward Hughes Allen*, and the children of that marriage, with the exception of their youngest daughter, my godchild *Amelia Allen*, to whom I bequeath the sum of 400*l.*, to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between *Edward Payne Miles* and *Arthur Fellenberg Miles*, the two youngest sons of *Septimus* and *Amelia Miles*, under the same restrictions, and subject to the same conditions as are contained in my will."

The testatrix afterwards wrote a letter, dated the 14th of *June* 1831, which was proved as a testamentary paper, containing the following words with reference to *William Edward Hughes Allen*: — "I cut him, his wife and children, off from all and every bequest I have formerly given to him or them."

The bill was filed by *Amelia Miles* and her husband, and their children named in the will, against the executors and *Amelia Allen*, who was an infant, and the questions in the cause were, first, whether the bequest in

1836.

MILES v. CLARK.

in favour of *Amelia Allen* given by the codicil was revoked by the testamentary paper; and, secondly, if that bequest was not revoked, whether *Amelia Allen* took an absolute, or only a life-interest.

Mr. *Pemberton*, for the Plaintiffs.

By the testamentary paper, the bequest in favour of the testatrix's godchild in the previous codicil is revoked. If that testamentary paper does not extend to the godchild, it is a mere repetition of the codicil; and the Ecclesiastical Court, if it had considered the declaration in the letter a mere repetition of the codicil, would not have admitted it to probate. Supposing it, however, to amount only to a repetition of the codicil, *Amelia Allen* will take only a life interest under the bequest in that codicil. The events of the death of the legatee "at, before, or after the said period," are severally contingent events, but taken together they constitute a certain event, namely her death, which must happen at one of those times. The only question, therefore, is what the testatrix meant by the words "the said period." She manifestly refers to the period which she had just mentioned, namely, "when she (the legatee) attains twenty-one." Now, whether *Amelia Allen* die at twenty-one, or before or after she attain that age, is, in each case, a contingency, but one of those contingencies must happen, and therefore, in every event, the children of Mrs. *Miles* are entitled in remainder after the decease of *Amelia Allen*.

Mr. *Witham*, for the executors.

Mr. *Kindersley*, for *Amelia Allen*.

The Ecclesiastical Court never discusses the construction that is to be put upon a testamentary paper in

1836.

MILES v. CLARK.

in considering the question whether it shall or shall not be admitted to probate; and it is for this Court to determine whether the letter which has, in this case, been proved as a testamentary paper, has any other effect than that of confirming the previous codicil. As to the second point, it is established by many cases, that the words, "in case of the death of *A.*," must be taken to mean "in case of the death of *A.* in the lifetime of the testator;" for the death of *A.* at some time or other is certain, and to give a sensible construction to the words, the contingency of *A.* dying in the testator's life-time must be implied. Now, it is admitted that the contingencies of death at, before, or after a particular period, taken together constitute certainty; the words in the present case, therefore, amount to no more than if the testatrix had said "in the event of her decease," and will fall within the rule which refers them to the life-time of the testatrix. If the words "when she attains twenty-one" were struck out, this would be the only construction that could be put upon this bequest; and the only effect of those words will be that the legacy is given over "in the event of the death of the legatee, whether she has or has not attained the age of twenty-one," in other words, "whatever may be her age," which will make no difference as to the construction of the words, "in the event of her death." *Amelia Allen*, therefore, will be absolutely entitled to this bequest, upon the ordinary rule which restricts the contingency of the words "in the event of the decease of *A.*," or words equivalent to them, to *A.* dying in the lifetime of the testatrix.

Mr. *Pemberton*, in reply.

The MASTER of the ROLLS said that he had no doubt, as to the first point, that the codicil was not revoked by the testamentary paper, for the latter contained no expression of discontent with *Amelia Allen*, and the testatrix

1835.

MILES v. CLARK.

trix could not, therefore, be considered as having revoked the exception she had made in favour of her godchild. The other point he would consider.

On the following day, his Lordship gave judgment as to the second point.

In this case the testatrix revokes a bequest which she had made by her will to her brother, his wife, and children, with the exception of their youngest child, her godchild, *Amelia Allen*, to whom she bequeaths the sum of 400*l.*, " to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between *Edward Payne Miles* and *Arthur Fellenberg Miles*, the two youngest sons of *Septimus* and *Amelia Miles*, under the same restrictions, and subject to the same conditions as are contained in my will."

If the words were in the event of her decease, the case would fall within the class of cases which have been referred to in the argument; but the words are in case of her decease at, before, or after the said period. Now " the said period" is obviously to be referred to the period which the testatrix has just mentioned, namely, when the legatee attains the age of twenty-one years. It is, therefore, " at, before, or after the period of twenty-one years." The words " at, before, or after a particular time," involve all time, present, past, and future. The only construction to be put upon these words, therefore, is in the event of her decease, whenever that event may happen. The remainder over, therefore, will take effect after her decease.

1836.

HAYES *v.* HAYES.

Jan. 30.
April 14.

THE will of the testator, *William Hayes*, so far as it is material, was in the following words: — "My temporal estate I bequeath and dispose of in the following manner: To my wife, *Fanny Hayes*, the interest on the whole of my property in the public funds during her natural life, the principal thereof being placed in the names of the undermentioned trustees for that purpose. Also to my said wife, *Fanny Hayes*, I give all my other property which I may be possessed of at the time of my decease, after paying my funeral expenses and all other lawful debts, part of my funded property being applied for that purpose if necessary. On the death of my said wife, *Fanny Hayes*, I give and bequeath as follows: — To my daughter *Jane Hayes* 200*l.* stock 3 per cent. reduced bank annuities; to *Jane Hunt*, daughter of my wife *Fanny Hayes*, 50*l.* stock 3 cent. reduced bank annuities; to *Eliza Hunt*, daughter of my wife *Fanny Hayes*, 50*l.* stock 3 per cent. reduced bank annuites; to my son *William Benjamin Hayes* the residue of my property after paying these legacies." The testator appointed his brother, *Benjamin Fyler Hayes*, and *William Gray* his executors and trustees.

A testator gave to his wife, *F. H.*, the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose if necessary. On the death of his wife he gave to his daughter *J. H.* 200*l.* stock 3 per cent.

Benjamin reduced annuities, and to two other persons 50*l.* 3 per cent. reduced annuities respectively, and to his son the residue of his property, after paying those legacies. And he appointed two persons his executors and trustees.

At the date of his will the testator had 700*l.* 3 per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage:

Held, that the gift to *F. H.* of the interest of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock, but that the other legacies were general, and that *F. H.* took only a life interest in the testator's residuary estate.

1836.

HAYES v. HAYES.

Benjamin Fyler Hayes alone proved the will. The testator had at the time of making his will a sum of 700*l.* 3 per cent. reduced bank annuities standing in his name, but he sold out that stock about a month before his death, and invested the sum of 411*l.*, part of the produce of the stock, upon mortgage. The testator had no stock in the 3 per cent. reduced bank annuities, or in any other public funds at the time of his decease. *Benjamin Fyler Hayes*, the surviving executor and trustee, paid the testator's debts out of a sum of 200*l.* which the testator had left in money, and he afterwards called in the mortgage-money, and invested the residue of the testator's personal estate in the sum of 624*l.* 19*s.* 8*d.*, 3 per cent. reduced bank annuities upon the trusts of the will.

The bill was filed by the testator's widow *Fanny Hayes* against the surviving executor and trustee, and the parties claiming interests under the will; and the questions raised in the cause, were, whether the bequests of stock, and the residuary bequest to the testator's son were adeemed, and by such ademption the whole of the testator's property belonged to his widow; or whether the first bequest only of the interest of the testator's funded property was specific, and consequently adeemed, and the widow took only a life-interest in the testator's general residuary estate.

Mr. *Parker*, for the Plaintiff.

The legacies given by this testator out of his property in the funds, which consisted at the time of making his will of a sum of 700*l.*, 3 per cent. reduced bank annuities, were specific legacies, and that sum of stock having been afterwards sold out by the testator, the legacies no longer subsisted *in specie* at the time of the testator's

1836.

HAYES v. HAYES.

testator's decease, and were consequently adeemed: *Humphreys* v. *Humphreys* (*a*), *Pattison* v. *Pattison* (*b*). The testator gives the interest on this stock, describing it as "the whole of my property in the public funds," to his wife during her life, and he gives her all the other property which he might be possessed of at the time of his decease, after paying his debts; part of his funded property being made applicable for that purpose, if necessary. The word "my" has, in many cases, been considered sufficient to shew that a legacy is specific; *Ashburner* v. *M'Guire* (*c*); but it is not necessary in the present case to rely on so minute a circumstance, for here the testator has expressly and studiously distinguished between his funded property, and his other property; and he had no other funded property except the stock, of which, after giving the interest of it to his wife for her life, and declaring that a portion of it should be applied, if necessary, to the payment of his debts, he proceeds specifically to dispose after the death of his wife. The stock given to the several specific legatees is described in every instance by its name of 3 per cent. reduced bank annuities, and when the testator gives the residue of his property to his son *William Benjamin Hayes*, he unquestionably means the residue of that specific property consisting of stock, for he had previously given all his other property to his wife, and he contemplates the possibility that all his other property might not be sufficient for payment of his debts, and if it should be sufficient, he gives her the surplus. Upon the death of the wife, therefore, there could be no property to be given in legacies to other persons, except the specific property, of which he had given the interest to his wife for life. The residue given to the son must, consequently,

(*a*) 2 *Cox*, 184.
(*b*) 1 *Mylne & Keen*, 12.
(*c*) 2 *Bro. C. C.* 108.

1836.

HAYES v. HAYES.

consequently, be a special residue, consisting of so much of the testator's stock as should remain after payment of such portion of it as he had made applicable, if necessary, to the payment of debts, and of the specific legacies. There being no ambiguity, therefore, in the language of the will, and the specific legacies having been adeemed by the sale of the stock, the widow is entitled to the produce of such sale, with the rest of the testator's general estate. This is a case in which the rule of law must prevail without reference to the intention of the testator, and that rule is that, when a specific thing is given, the gift must, in order to take effect, subsist *in specie* at the time of the testator's decease. In *Barker* v. *Rayner* (*a*), the testator made a bequest of two policies of assurance, effected on the life of his wife, and *all his interest* in those policies; and having survived his wife, he was obliged to receive from the insurance office the amount of the money for which his wife's life was insured. In that case there was not only no *animus adimendi*, but the character of the property was altered against his will, and yet the Court held that the legacy was adeemed, There is, in reality, no hardship in the present case; for, if the law of ademption had not been as clear as it is now settled to be, the widow would, in effect, be left without a provision; a result which must be presumed to have been as contrary to the intention of the testator, as the disappointment of the specific legatees.

Mr. *Stinton*, *contrà*.

It is not disputed that the intention of the testator will be defeated, if the legacies given to his children, and the children of his wife, are to be considered as adeemed. If,

(*a*) 5 *Mad.* 208.

1836.

HAYES v. HAYES.

If, therefore, there is in any thing in this will which will furnish a ground for excluding the operation of the rule of law with respect to the ademption of specific legacies, the Court will struggle to prevent a manifest failure of the testator's intention. The effect attributed to the word "my" has not been given to it, unless coupled with the particular stock referred to; *Parrott* v. *Worsfold* (*a*), and here the testator speaks only of his property in the public funds generally. Supposing, however, the particular stock at that time standing in the name of the testator to be referred to, the testator does not treat it as the subject of a specific bequest, for he makes it applicable to the payment of his debts; and how can a gift upon condition — a gift so uncertain in its nature that it was liable to be absorbed by the claims of creditors — be characterised as a specific gift, or considered in any other light than as a part of the testator's general estate?

It is only by matter *dehors* the will that it is attempted to identify the legacies given after the decease of the wife with the stock in the public funds, of which the interest was previously given to her. Upon the face of the will there is nothing to shew that these legacies constitute part of the property in the public funds previously referred to, and a legacy will not be construed to be specific by implication.

Mr. *Parker*, in reply.

April 14.

The MASTER *of the* ROLLS (after stating the will).

The testator was, at the time of making his will, possessed of 700*l.* three per cent. reduced annuities, but, after

(*a*) 1 *Jac. & Walk.* 602.

1836.

HAYES v. HAYES.

after the date of his will, he sold out that sum of stock, and invested part of the produce of the sale on mortgage. For the Plaintiff it was contended, and I think justly, that by the words, "whole of my property in the public funds," the testator meant the 700*l.* 3 per cent. reduced annuities, which was the only property in the public funds which he had, and that the legacy of the interest of this property was specific, and was adeemed by the sale of the stock. It was further contended, on the part of the Plaintiff, that the legacies given upon the wife's death appear on the face of the will to be parts of the same stock. They are gifts of that denomination of stock which was specifically given to the wife for life, and it was alleged that they could refer to nothing else, because all the remainder of the testator's property was, in his own contemplation, probably insufficient for the payment of his debts, and any surplus was given absolutely to the Plaintiff.

In that argument I cannot concur. The legacies which are given after the wife's death are, in expression, quite general: "I give to my daughter *Jane Hayes* 200*l.* 3 per cent. reduced bank annuities, and so with two other gifts of the same kind; no reference to his said property in the public funds; nothing to connect these legacies with the former specific gift, but the mere similarity of denomination which does not appear on the will itself, and I think that his direction, that parts of his funded property might, if necessary, be applied for payment of his debts, does not afford an argument which aids the Plaintiff's case. If any thing, it shews that the testator contemplated clearly an event, in which the Plaintiff was not to have more than a life interest in any part of his property; and this, I think, was his real intention.

As to a specific portion of his property, he gives her expressly a life interest; as to all his other property, he gives

1836.

HAYES v. HAYES.

gives it to her in words without limitation, but then he says, that on her death he gives certain sums of stock to three persons named, one being his own daughter, and the other two daughters of his wife; and he then gives "to his son *Benjamin Hayes*, the residue of his property after paying these legacies." There is no ground for saying that the word "property" in this gift is the funded property, or the residue of the funded property specifically given to the Plaintiff for life; it means the residue of the other property which he had given, subject to debts, to the wife without words of limitation, and the gift is made expressly subject to the legacies.

I am therefore of opinion, and so decree that, according to the true construction of the will, the Plaintiff is entitled for her life only to the residuary estate of the testator; and that, upon her death, the legatees, *Jane Hayes*, *Jane Hunt*, and *Eliza Hunt*, or their representatives, will be entitled to the stock legacies by the will given to them, and that, subject to those legacies, the Defendant *William Benjamin Hayes* is entitled to the ultimate surplus of the testator's estate, and I direct the usual accounts to be taken.

1836.

Jan. 20. 22, 23.
April 13.

ATTORNEY-GENERAL *v.* CULLUM.

The principal charge in an information being, that certain alienations made by the trustees of the charity lands were not authorised by the inclosure act under which they purported to be made, and in particular that an improvident exchange had been made in order to favour one of the trustees; and it appearing that, although the directions of the inclosure act had not been strictly followed, nearly twenty years had elapsed since the transaction, and neither the exchange with the trustee nor any of the alienations were shewn to have been improvident or improper, the information was dismissed with costs as to that part of it; and the information, as it was framed, not appearing to have been filed with a view to the benefit of the charity, and having been instituted and conducted in a manner to create great unnecessary expense, no costs were given to the relators up to the hearing, as to that part of the information which was not dismissed.

THE information was filed by the Attorney-General at the relation of *Francis King Eagle*, Esq., and *James Cobbing*, against the trustees of the *Guildhall* feoffment in *Bury St. Edmund's*, and it prayed that the charities, and other public trusts and purposes of the lands and premises constituting the feoffment, and comprised in an indenture dated the 20th of *December* 1810, might be established; and that the management of the estates, and the application of the rents and profits, might be settled under the decree of the Court, and that the Master might approve of a scheme for that purpose. That it might be declared that certain alienations and pretended exchanges of the charity lands, and in particular an alienation to *Thomas Cocksedge*, were not authorised by an inclosure act under which they purported to be made, and were therefore void. That it might be referred to the Master, to inquire whether any proceedings ought to be taken with a view to set aside such alienations and pretended exchanges, and whether any proceedings ought to be taken to set aside certain leases on the ground of their having been improperly and improvidently granted; and that it might be declared that the leases ought to be let by public tender. That it might be referred to the Master to approve of new trustees, either in exclusion of, or in conjunction with the Defendants, the surviving trustees, as the Court

Court might deem expedient. And that, if necessary, an account might be taken of the rents received by the Defendants, from such time as the Court might think proper.

The original information had prayed a declaration, that the Defendants, by reason of wrongful alienations, had been guilty of breaches of trust, and ought to be removed, and was in other respects different from the information as amended.

The information, after stating the origin and nature of the trusts, alleged that, by reason of mismanagement and improvident expenditure, the net yearly income applicable to the several purposes of the charity was greatly disproportioned to the amount of the gross yearly rents. That the management of the foundation had for some time past given great dissatisfaction to the town of *Bury St. Edmund's*, and that there existed in that town a strong conviction that such management was altogether improvident, and that the estates were not beneficial and available to such charitable and other public trusts and purposes, as the same might be under a due management and administration thereof.

The information proceeded to state that public meetings had been held at *Bury* for the purpose of inquiring into the affairs of the feoffment; that a committee of inhabitants was formed for that purpose, and came to a resolution to make inquiries from the trustees, and that the trustees refused to give any information.

The information then stated that the management of the charity was placed in the hands of a committee, who did not regularly meet, but delegated their duty to the receiver, and exercised no sound discretion. That by certain alienations the lands had been altered, and the

1836.

ATTORNEY-GENERAL v. CULLUM.

the boundaries varied, so that the identity thereof was no longer preserved, and that it had become necessary to have such boundaries ascertained, and the identity of the lands secured. That, under colour of an inclosure act, passed in the 55th year of the reign of *George* III., for inclosing lands in the borough of *Bury St. Edmund's*, the trustees for the time being concerted certain alienations to some of their own body, in exchange for lands of theirs, in order to favour such persons; and that amongst these an alienation of fifty-eight acres was made to *Thomas Cocksedge*, a trustee, for twenty-three acres belonging to him, and taken in exchange, which alienation was alleged to be grossly improper, improvident, and disadvantageous to the charity, the land taken in exchange for the charity land being deficient in quantity and value, and having required a large expenditure for its useful occupation; and the land given in exchange being of peculiar value to *Cocksedge*, by reason whereof he ought to have given a larger consideration for it. It was moreover alleged that this exchange was conducted without any regard to the forms required by the inclosure act; and was on that account wholly void, and ought to be set aside.

The information alleged, that divers other alienations, by way of exchange, had been made by the trustees under similar circumstances, and that such alienations were for the like reason to be considered as void. And it further contained charges, among some others, that improper leases had been granted by the trustees, and that the patronage of the trustees had been improperly exercised.

In support of the information, the exchange with *Cocksedge*, one of the trustees of the charity, of a portion of land belonging to the charity for other land alleged

alleged to be deficient in quantity and value, was mainly insisted upon as constituting a strong ground for inquiry. No corrupt motives were imputed to the trustees, but the evidence on the part of the relators was relied upon as shewing that the exchange was improvident and injurious to the charity, and that the interests of the charity called for an investigation of the transaction, for the purpose of ascertaining whether proceedings might not be successfully taken to set it aside. That investigation, it was contended, was the more necessary, as it appeared that the directions of the inclosure act, under which the exchange purported to be made, had not been followed, and the exchange was consequently void. The land allotted by way of exchange to *Cocksedge* consisted partly of common field land and partly of old inclosure, part of *Cocksedge's* land also consisting of old inclosure, and no authority being given by the inclosure act to deal with old inclosure. It had been decided in *Wingfield* v. *Tharp* (*a*), that where the commissioners had no authority under the act to exchange allottable land for old inclosure, an allotment given as a compensation for common field land and old inclosure was invalid. The commissioner had no power, under the provisions of the inclosure act, to make such an allotment as had been made to *Cocksedge*, and even if the act had given the power, the character of the party to whom the alienation was made, that party being one of the trustees of the charity, and the secret manner in which the exchange was made, were sufficient to invalidate the transaction. There was a considerable surplus income derived from the rents of the charity estates, the proper application of which could only be settled by a scheme. Part of the income was applied to purposes not indicated by the trust deed. In

(*a*) 10 *B. & Cress.* 785.

1836.

ATTORNEY-GENERAL v. CULLUM.

In many instances, where the purposes indicated by the deed were followed, the payments were not made by the trustees in conformity with the sums specified by the deed, and there was a large and unnecessary expenditure in buildings and repairs. All these circumstances shewed the necessity of having a scheme for the management of the charity framed under the direction of the Court. The number of trustees was reduced from twenty-eight to eight; and the appointment of new trustees under the direction of the Court had become necessary, there being no power in the deed for that purpose. The site of the alms-houses had been changed without necessity or benefit to the charity, and the appointment of alms-people had been made matter of individual patronage. Against that abuse provision ought to be made. As to the charge of granting improper leases, no special inquiry was asked. The resolutions passed at public meetings of the inhabitants of *Bury St. Edmund's* expressing their dissatisfaction at the management of the charity and the conduct of the trustees, and the fact of the commissioners of charities having in 1832 recommended one of those meetings to convene for the purpose of taking measures to procure the filling up of the trust, and a new scheme of uses, were also insisted upon as circumstances affording strong evidence of the necessity which existed for the interposition of the Court in the regulation of the charity, and a full justification of the motives which had induced the relators to file the present information.

On the other side, it was insisted that this was one of that class of informations with which the Court had of late years been too familiar, which, though, purporting to have the sanction of the Attorney-General, had in reality nothing but the formal and nominal sanction of that officer, and which, so far from being instituted

or

1836.

ATTORNEY-GENERAL v. CULLUM.

or conducted with a view to the benefit of charities, were instituted for purposes of a totally different description, and conducted in a manner which had a direct tendency to injure and ruin, and in many cases must, unless checked and arrested in their progress by the Court, have the inevitable effect of destroying the charitable foundations whose abuses it was their pretended object to correct. Informations of this kind had increased to a great extent, in consequence of the facilities afforded to speculators in litigation by the publication of the Report of the Charity Commissioners, and if the present information should be found to be one of that description, the Court would no doubt do its duty by protecting the charity, and defeating the object of the parties at whose instance the proceedings were instituted. If the main charge made against the trustees of this charity, — that charge which, though in effect abandoned by the relators themselves, had swelled the pleadings from seven brief sheets to their present bulk, — should appear to be utterly without foundation, even though there might be one or two minor points which, if properly brought before the Court, would have called for its interposition, the Court could not, looking to the manner in which this suit had been instituted and conducted, do substantial justice, except by refusing to make any decree, and by dismissing this information with costs. The original bill was filed to set aside the exchange with *Cocksedge*, to remove the trustees, and to make them personally pay the costs. No part of this relief was sought in the amended bill. That amended bill was increased, indeed, from seven to twenty-three brief sheets, but the charges of corruption and breach of trust were abandoned, and no relief was prayed personally against the trustees. Much, however, as the amended differed from the original bill, those bills did not

1836.

ATTORNEY-GENERAL v. CULLUM.

not differ more from each other, than did the relief sought by the amended bill differ from the relief asked at the bar. The true explanation of this extraordinary departure was, that there was no ground whatever for impeaching the conduct of the trustees or the management of the charity, and that the proceedings had not been instituted for the purpose, which could alone justify the filing of an information, namely, that of promoting the benefit of the charity. The evidence on the part of the Defendants would shew that the exchange with *Cocksedge* was not only a perfectly fair transaction, but that it was actually beneficial to the charity. No inquiry was asked as to the leases, or the expenditure in repairs, and, except as regarded that part of the information, which sought the filling up of the number of trustees, and the application of the surplus income, there was no pretence whatever for bringing this case before the Court. Lapse of time and change of circumstances had rendered it impossible to apply many of the gifts in the manner originally pointed out by the donors; but it was admitted that there had been no improper application of the income; and the effect of directing a scheme, in a case where there were not fewer than twenty-six separate gifts by different donors, would be to burthen the charity with an expense which would defeat all the useful purposes which it was intended to promote. Upon these grounds it was submitted that the information ought to be dismissed with costs.

Much evidence of a very conflicting kind was read on the one hand to impeach the exchange with *Cocksedge*, and on the other hand, to shew that the exchange was not only not unfair or improvident, but advantageous to the charity.

Mr.

1836.

ATTORNEY-GENERAL *v.* CULLUM.

Mr. *Temple*, Mr. *Blunt*, and Mr. *O. Anderdon*, in support of the information.

Mr. *Pemberton*, Mr. *Lovat*, and Mr. *Elderton*, *contrà*.

April 13.

The MASTER *of the* ROLLS, after stating the object and substance of the information.

I cannot proceed to the consideration of the merits of this case without first stating, that with regard to them I entirely put out of the question all the allegations in the information, all the evidence adduced, and all the statements at the bar relating to the dissatisfaction said to prevail at *Bury*, to the public meetings there held, and the committees there appointed for the purpose of inquiring into or expressing opinions on this case, and also the statement made at the bar, that the relators on whose suggestion the information is filed are delegated by, and represent the general voice of the persons interested in the charity. With these circumstances, as affecting the merits, I have nothing to do. The feeling or conviction of the inhabitants of *Bury*, or of any particular portion of them, if it exists, (which I have no means of accurately knowing), does not even tend to prove or disprove an alleged breach of trust, or an alleged want of due management of the estates of the charity. In this place the case, like every other, must be considered upon the allegations and proofs which are relevant to the issue; upon the allegations which the Attorney-General, as a public officer, has sanctioned with his name, and upon the proofs which he, by authorising the information, has permitted the relators to advance; and every thing else I shall entirely disregard.

The

1836.

ATTORNEY-GENERAL v. CULLUM.

The main charge in the information relates to the alienations, and particularly the alienation to *Cocksedge*.

It appears that part of the trust property consisted of lands and rights of common, in, over, or upon certain open and common fields, situate within the borough of *Bury St. Edmund's*. In the beginning of 1814 a bill for inclosing these common fields was in contemplation. There is nothing in the evidence to shew that the trustees originated the proposal for this purpose; but, the proposal being made, they appointed a committee to consider of the expediency of the inclosure so far as it affected the trust. This committee made a report on the 15th of *February* 1814, and a resolution was made, that if the inclosure should be carried into effect, the trustees recommended only one commissioner to be appointed, and that commissioner to be Mr. *Jocelyn*.

The act was passed in *June* 1814, and Mr. *Jocelyn* was appointed sole commissioner. The only part of the act which it seems necessary for me to notice, is that which gives the power to make exchanges at page 12.

[Here his Lordship read that part of the act.]

After the act had passed, the commissioner proceeded to the performance of the duty imposed on him, and the trustees appointed a committee to arrange and superintend the interest of the trustees under the act; and it appears that, in *October* 1815, the trustees had not only come to an understanding as to the allotments which they wished to be made to them, but had agreed with *Cocksedge* to exchange with him three parcels of their inclosure for part of his intended allotment of equal value; and, accordingly, on the 13th of *October* 1815, the trustees

1836.

ATTORNEY-GENERAL v. CULLUM.

trustees by their receiver request the commissioner to make the allotments to them in certain situations, and on the following day, *Cocksedge* and *Steele* the receiver for the trustees, by order of the committee, wrote to the commissioner and informed him that the trustees had agreed to give to *Cocksedge* three parcels of old inclosure for as much common land belonging to *Cocksedge*, as in the judgment of the commissioner should be of equal value. Other exchanges were at the same time in contemplation, and by a resolution of the 30th of *October* 1815, the committee was empowered to agree to such exchanges as they might think necessary to carry into effect the inclosure. The agreement with *Cocksedge* already noticed, was to exchange old inclosure belonging to the trust for allotable common land belonging to *Cocksedge*: it had no relation to *No Man's Meadow*, an old inclosure belonging to *Cocksedge*, and the subject of much discussion in this case. But about the beginning of *December* 1815, it appears that some arrangement for the transfer of *No Man's Meadow* to the trust had taken place; on the 8th of *December*, the trustees so far considered *No Man's Meadow* as being or likely to be their own, that they ordered an advertisement for proposals for hiring it to be inserted in the next *Bury* paper; and, on the 12th of *December*, *Cocksedge* and *Steele*, the receiver as agent of the trustees, wrote to the commissioner to inform him, that it was agreed that the trustees should give up to *Cocksedge* so much of *Woodfield* lying nearest to St. *Edmund's Hill* as the commissioner should judge to be equal in value to certain parcels of land called *No Man's Meadow*, in the occupation of *Samber*, which *Cocksedge* was to give up to them. This agreement did not interfere with the former, by which a part of *Cocksedge's* allotable common land was to be given to the trustees in exchange for old inclosures belonging to the trust; but it is clear that these were not the final

1836.

ATTORNEY-GENERAL v. CULLUM.

agreements between *Cocksedge* and the trustees, for on the 29th of *August* 1816, the commissioner made his award. He thereby made twelve allotments to *Cocksedge*, and seventeen allotments to the feoffment; and it appears from the evidence of *Richard Payne*, that of the twelve allotments made to *Cocksedge*, the first, second, third, fourth, fifth, and eighth, were made in exchange for the ninth of the seventeen allotments made to the feoffment. It further appears, that the first, second, and eighth allotments made to *Cocksedge*, were old inclosures previously belonging to the trust; and the same for which by the agreement of the 14th of *October* 1815, the trust was to receive in exchange certain common land before belonging to *Cocksedge*, and that the ninth allotment made to the trust was old inclosure belonging to *Cocksedge*, and the same in denomination, though probably not in quantity, as is mentioned in the agreement of the 12th of *December* 1815. How the final agreement which was acted upon by the commissioner was signed or evidenced does not appear, and I cannot assume it to have been done in a manner inconsistent with the provisions of the act. But upon the best consideration which I can give to the subject, I am not satisfied that the directions of the act of parliament were strictly followed either by the trustees and *Cocksedge*, or by the commissioner. In making the exchange, the transaction was not distinctly treated as an exchange; but, the first, second, and eighth allotments to *Cocksedge*, though old inclosures belonging to the feoffment, and the ninth allotment, though an old inclosure belonging to *Cocksedge*, were treated as allotable land and dealt with accordingly, without reference to the forms required for exchanges.

But all this was done openly after treaty, and upon agreement between the parties; and the question here is not,

1836.

ATTORNEY-GENERAL v. CULLUM,

not, as in the case of *Wingfield* v. *Tharp* (*a*), and in another case recently before me, whether a purchaser shall be compelled to take a title under such a transaction, but whether, after a lapse of very nearly twenty years, and under all the circumstances of this case, it can be beneficial to the charity (the interest of which I have alone to attend to,) to make an attempt to set aside what has been done; and, in this consideration, I must look not merely to forms, or to the important fact that *Cocksedge* was himself one of the trustees, but to all the evidence relating to the nature of the transaction and the value of the property.

In the first place, I find nothing in the evidence to warrant the allegation contained in this information, that the trustees, under colour of the act, took occasion to concert alienations of the trust land to some of the trustees, or to any others, in order to favour such persons. I am of opinion that the evidence does not countenance the allegation in respect either to the exchange to *Cocksedge*, or to any other alienation which has been brought to my notice.

The evidence as to the value of the lands, which in the transaction with *Cocksedge* were given or taken in exchange, is conflicting.

[Here his Lordship went into a minute examination of the evidence.]

Considering the parol evidence in conjunction with the documentary evidence on both sides, I have no hesitation in saying, that in my opinion, the evidence for the Defendants greatly preponderates; and after a careful

(*a*) 10 *Barn. & Cress.* 785.

1836.

ATTORNEY-GENERAL v. CULLUM.

careful consideration of the whole, I am satisfied that the exchange with *Cocksedge*, which is principally complained of, and the other exchanges adverted to in the pleadings, are none of them made out to have been improvident and improper; nor is there even such a *primâ facie* case on the part of the relators, as to induce me to think it for the interest of the charity that any further inquiry into the subject should be made.

There is no evidence to satisfy me that the inclosure was effected at an improper expense to the trust, and the money paid for old leases surrendered does not appear from the evidence to have been applied improvidently for the charity.

With respect to the leases, the counsel for the Attorney-General very properly abstained from asking any special relief; they asked only for such regulations as might be considered proper on the settlement of a scheme, and it is plain that, upon the evidence, they could not have been entitled to more.

With respect to the administration of the charity, and the claim to have a scheme settled under the decree of this Court, it appears by an indenture dated the 28th of *December* 1810, stated in the information, and which, *mutatis mutandis*, is very nearly a copy of a former indenture, dated the 22d of *February* 1736, which is proved in the cause, that the property now vested in the Defendants has been derived from several donors and benefactors, who, from time to time, made gifts for the benefit of the town of *Bury* in various modes. The conveyance was made to the intent, not only that the pious memories of the founders might be recommended to posterity with honour, as examples to be imitated, but also that the property might be employed according to

1836.

ATTORNEY-GENERAL v. CULLUM.

to the true intent of the founders, and upon trust that the trustees would employ the rents for the common profit and benefit of the town of *Bury*, in such manner and for such purposes as were mentioned in the schedule thereto annexed, or such other uses for which the same were given by the donors, though not mentioned in the schedule.

It is admitted that the schedule here referred to directs payments which amount in the whole to less than the present annual income of the estates, and it appears that some of the purposes for which the payments have been directed to be made have ceased to be required.

It appears also that the trustees appointed by the deed were twenty-eight in number; that they are now reduced to very few, of whom at least one is incapable of acting, and the deed contains no power or provision for appointing new trustees.

Under these circumstances it appears to me, that the assistance of the Court is wanting for the administration of the income, and for the appointment of new trustees. But considering that this object, which appears to me the only one to be effected by the information, might have been obtained by a very simple proceeding, and at a small expense; and, considering that the complaint which appears to have been made the main purpose of the information has failed, I have hesitated whether I ought to make any decree. In the result, I think that I may subject the charity to a less burthen of costs by making a decree on this information, than by leaving the parties interested to commence a new proceeding. If I could have considered that the relators had procured this suit, framed as it is, to be instituted only for the purposes of the charity, I might have found it my

1836.

ATTORNEY-GENERAL v. CULLUM.

duty to allow them some part at least of their costs out of the charity estates. Circumstances have appeared which tend to make me suspect at least, that notwithstanding the respectability of the relators, which has not been impeached, some object besides the welfare of the charity has been in view. I cannot act upon that suspicion, but thinking, as I do, that the suit has been instituted and conducted in a manner to create a great deal of unnecessary expense, I think it right to frame my decree in terms to save the charity estate from costs to which I think it ought not to be subjected.

I dismiss with costs so much of the information as prays for a declaration that the alienations, and particularly the alienation to *Cocksedge*, were not authorised by the inclosure act, and are therefore void, and that an inquiry may be made whether any proceedings ought to be adopted to set aside such alienations, and whether any proceedings ought to be adopted to set aside certain leases, and that it may be declared that the leases ought to be let by public tender.

I direct a reference to the Master to take an account of the estates and property vested in the Defendants on the trusts of the indentures of the 28th day of *December* 1810, and of the rents and profits thereof which have been received since the filing of the information, and of the application thereof. I refer it to the Master to approve of a scheme for the future management of the trust estate, and for the application of the rents and profits thereof, having regard, as near as may be, to the uses and purposes stated in the indenture of the 28th of *December* 1810; and I refer it to the Master to approve of trustees to act in conjunction with such of the Defendants as are now willing to act.

And

1836.

ATTORNEY-GENERAL v. CULLUM.

And as to the costs of that part of the information which is not dismissed, I give none to the relators up to this time.

The extra costs of the Defendants, as to the part dismissed, they are to have out of the estates.

The other costs of the Defendants up to this time, and the subsequent costs of the relators and the Defendants, are reserved.

FELLOWS *v.* BARRETT.

March 21.

The Court will not compel the next friend of an infant, on the ground of poverty, to give security for costs.

THE bill was filed by *Lucy Fellows*, as mother and next friend of the infant Plaintiff, for the purpose of having secured for the infant Plaintiff the share of the property to which he was entitled under the will of his grandfather, as one of the testator's next of kin.

Mr. *Bilton*, on the part of the Defendants, the executors and the other next of kin, moved that *Lucy Fellows* might be ordered to find security for costs on the ground that she was a pauper, receiving weekly relief from the parish of *Henley-upon-Thames*, a fact supported by the affidavit of the overseer of that parish. He cited an anonymous case in *Mosely's Reports* (*a*), and *Pennington* v. *Alvin* (*b*), in support of the application.

Mr. *Dixon*, *contrà*.

No authority can be produced to establish the proposition that the *prochein ami* of an infant can be compelled,

(*a*) page 87. (*b*) 1 *Sim. & Stu.* 264.

1836.

FELLOWS v. BARRETT.

pelled, on account of poverty, to give security for costs. *Pennington* v. *Alvin*, the case cited on the other side, was that of a suit instituted by a *feme covert*, which is substantially the suit of the party herself; and Sir *John Leach* commences his judgment with this observation: "I should hesitate much before I called upon the next friend of an infant to give security for costs; for any person may file a bill in the name of an infant." In *Davenport* v. *Davenport* (*a*), the same Judge refused to inquire into the circumstances of the proposed next friend, though it was suggested that he was in indigent circumstances.

The MASTER *of the* ROLLS said he was not aware of any instance in which a Plaintiff, on the mere ground of poverty, whether suing in his own right or as *prochein ami*, had been compelled to give security for costs. In charity cases the relator must be a responsible person, and, if shewn to be in indigent circumstances, would not be allowed to sue. His Lordship, however, gave time to the counsel for the Defendants to search for authorities.

The case was afterwards mentioned; but no direct authorities were produced: *Wyatt's Practical Register* (*b*), *Lord Redesdale's Treatise on Pleadings* (*c*), and the cases of *Turner* v. *Turner* (*d*), and *Witts* v. *Campbell* (*e*), were cited.

Motion refused.

(*a*) 1 *Sim. & Stu.* 101.
(*b*) page 349.
(*c*) page 21. 4th edit.
(*d*) 1 *Str.* 708.
(*e*) 12 *Ves.* 493.

1836.

ATTORNEY-GENERAL *v.* CROOK.

March 14, 15.
April 18.

If a spiritual duty attached to the office of a corporator of a charitable corporation be not properly performed, the Court will not interfere, but application should be made to the visitor or the proper spiritual authorities.

The Court refused to direct an inquiry as to the propriety of granting leases of charity lands for lives, renewable upon a fine, at a small reserved rent, where there had been no alteration in the mode of letting the lands for upwards of 200 years.

THIS information was filed by the Attorney-General, at the relation of *John Lewis* and four other persons, against the master of the hospital of *St. Mary Magdalen*, in the hamlet of *Holloway*, and it prayed that the hospital might be established and regulated under the decree of the Court; that it might be declared that a competent number of poor idiots or insane persons ought to be received into the hospital, and there maintained out of the rents of the estates; that it might also be declared that the master was bound to perform divine service in the chapel for the benefit of the inhabitants of *Holloway*, or that the chapel might be made available for the performance of divine service, as might appear needful, and that proper directions might be given in that behalf; and in case of need that one of the Masters of the Court might approve of a scheme for better effectuating those purposes. The information also prayed that the sum of 380*l.* belonging to the hospital might be invested, and secured for the benefit of the master for the time being; that leases ought not to be granted, except at the actual improved value without fine or foregift; that such accounts might be taken as the Court might think necessary, and that the Master might inquire whether any and what proceedings ought to be adopted to set aside leases.

The information stated that the hospital known by the name of the hospital of *St. Mary Magdalen*, situate in the hamlet of *Holloway*, at *Widcombe* and *Lyncombe*, near *Bath*, had existed from time out of memory; that there now belonged to the hospital a small messuage or tenement,

1836.

ATTORNEY-GENERAL v. CROOK.

tenement, and an ancient chapel, and that the deeds and writings constituting the original foundation and endowments of the chapel were not forthcoming, and might be presumed to be lost, from lapse of time. That certain subsisting leases, of which the earliest were dated in the year 1694, were expressed to be made by the master, and co-brethren and sisters of the hospital, but that for a long time past there had not been any such co-brethren and sisters, the only persons constituting the corporate body of the hospital having been the masters for the time being. That it appeared from an inquisition taken in the reign of Queen *Elizabeth*, that the messuage or dwelling-house, belonging to the hospital, had been devoted to and used as the residence of poor persons being idiots, or otherwise imbecile, and unable to take care of themselves, who had been maintained and supported out of the rents of the lands belonging to the hospital; and that the chapel had from a remote period been used for the performance of divine service, at the charge of the master for the time being, for the benefit of persons residing near thereto, and especially the inhabitants of the hamlet of *Holloway*.

The information then stated that in the year 1823 his late Majesty *George* IV. by letters patent under the great seal, granted to the Defendant, the Rev. *Charles Crook*, the office of master of the said hospital during his life, and it charged, among other things, that by the neglect of successive masters of the hospital, and of the Defendant, the property belonging to the charity had become greatly deteriorated; that no adequate relief had been afforded to the objects of the charity; that only one idiot had from time to time been maintained in the hospital; and that it had been the habit of the master, on the admission of such idiot, to receive a fee of

1836.

ATTORNEY-GENERAL v. CROOK.

of thirty guineas from the friends of the idiot, which he applied to his own use.

Two of the questions raised in the cause were, first, whether leases of the charity lands, let for lives upon a fine or foregift, at a small reserved rent, ought not to be set aside; and secondly, whether the master of the hospital ought not to be compelled to perform divine service in the chapel.

Mr. *Pemberton* and Mr. *O. Anderdon*, in support of the information.

Mr. *Kindersley* and Mr. *Piggott*, *contrà*, upon the question as to the leases, cited the *Attorney-General* v. *Cross* (*a*), where Sir *W. Grant* said that he was not aware of any principle or authority on which it could be held that a lease of a charity estate for lives, or for a long term of years determinable upon lives, was, on the face of it, an abuse of trust. In the present case, the estates have been let in the same manner for upwards of 200 years. In the *Berkhampstead School case* (*b*) it was referred to the Master to consider of a scheme for letting the estates in future, and the Master approved of the plan which had been previously acted upon, namely, that of letting by auction for thirty-one years, or lives determinable at that period, partly on fines, and partly on rents specified.

As to the question whether this Court was not called upon to compel the master of the hospital to perform divine service, it was clear upon two grounds, that the Court had no jurisdiction to compel the performance of divine service by the master. In the first place, the gift of

(*a*) 3 *Mer.* 524. (*b*) 2 *V.* & *B.* 134.

1836.

ATTORNEY-GENERAL v. CROOK.

of the lands, of which the chapel constituted a part, was in the Crown; this was a donative, therefore, without cure of souls, and this Court had no jurisdiction over the incumbent of a donative without cure of souls. No instance could be cited in which the Court had ever attempted to exercise jurisdiction over the incumbent of a pure donative by compelling him to perform divine service. In the next place, this being an eleemosynary corporation, and the chapel, as appendant to the hospital, being in the gift of the Crown, the king was the visitor: *Blackst. Com.* (*a*), *Attorney-General* v. *The Earl of Clarendon* (*b*). Lord *Coke* (*c*) laid it down, that "if the king doth found a church, hospital, or free chapel donative, he may exempt the same from ordinary jurisdiction, and then his chancellor shall visit the same; and if the king do found the same without any special exemption, the ordinary is not, but the king's chancellor to visit the same." Hence it was clear that the Court of Chancery had no jurisdiction, and that, if the master were justly chargeable with any neglect of his spiritual duties, this was rather for the cognizance of the king, or of his chancellor in his visitatorial capacity. This principle was distinctly recognized by Lord *Eldon* in the *Berkhampstead School case* (*d*). It made no difference, in the present case, as to the question of jurisdiction, whether the chapel were or were not a donative, for if it were a donative, the king was the visitor; and if it were not a donative, the neglect of the incumbent in the performance of his spiritual duties was a matter belonging exclusively to the cognizance of the ordinary.

Mr. *Pemberton*, in reply.

All that Sir *W. Grant* has said in *The Attorney-General* v. *Cross*, is that a lease of charity lands for lives, or

(*a*) vol. i. p. 481.
(*b*) 17 *Ves.* 491.
(*c*) 1 *Inst.* 344 *b.*
(*d*) 2 *V. & B.* 144.

1836.

ATTORNEY-GENERAL v. CROOK.

or a long term of years determinable upon lives, is not, upon the face of it, to be held an abuse of trust. The inference, *primâ facie*, is that such a lease is not for the benefit of the charity, but it is not to be conclusive. That proposition does not in the least degree interfere with the principle laid down by Lord *Eldon*, that this Court has authority to control a leasing power in the trustees or trustee of a charity, if it should appear to be for the benefit of the charity, that such leasing power should not be acted upon. As to the jurisdiction of the Court to compel the master to perform divine service, it is assumed, on the other side, that this is a chapel donative without cure of souls. But the real question is not whether the king is visitor, but whether there is a trust for the application of the funds of this charity to the performance of a particular duty by the master; and if there be such a trust, this Court has, undoubtedly, jurisdiction to enforce the performance of it.

The MASTER *of the* ROLLS. *April* 18.

In these proceedings the origin of this foundation does not appear. There seems to have been a corporation consisting of a master, co-brethren, and sisters. The master is the only member of the corporation now remaining. His office is in the gift of the Crown, but the grant contains no reference to the duties which the master has to perform, and, except to a very small extent, I cannot from any thing before me learn either what those duties are, or whether there are any probable means of ascertaining what they are.

The foundation possesses a chapel which has, at least occasionally, been used for the performance of divine service,

1836.

ATTORNEY-GENERAL v. CROOK.

service — estates of considerable value, which have been let on leases for lives for which fines or foregifts have been taken — and a house called a hospital, which has been used for the reception of poor idiots or insane persons.

The principal questions raised in this cause relate to these different possessions.

The information alleges that the chapel ought to be applied, at the charge of the Defendant, to the performance of divine service for the use of the persons residing near thereto, and especially the inhabitants of the hamlet of *Holloway;* and it is charged that the Defendant himself procured his office on the understanding that he was to perform divine service; that he in fact repaired and opened the chapel; that divine service was for some time regularly performed, but that the chapel was afterwards improperly shut up and still continues so.

Upon this part of the case, I can find no sufficient evidence by usage or otherwise that the duty of performing divine service in the chapel for the use of persons residing near thereto was imposed on the Defendant by reason of his holding the office of master, nor any sufficient evidence of a contract binding upon him in this respect; but this is the less material, as, if the duty were established, I should not think this a subject on which this Court would properly interefere. If there is a spiritual duty attached to this office, and not properly performed, application should be made to the visitor or to the proper spiritual authorities.

With respect to the leases, it does not appear that any alteration in the mode of letting has been made for more than

than 200 years. It is clear, as has been stated by Sir *W. Grant* in *The Attorney-General* v. *Cross* (*a*), that there is no such principle as that a lease of a charity estate for lives is on the face of it an abuse of trust, and, no other ground of invalidating the leases appearing, I am of opinion that I ought to make no declaration in that respect.

As to the hospital, it is admitted that the house so called has been used for the reception of idiots, and that the idiots there received are to be provided for and maintained, but the Defendant, as he says, following his predecessors, has received a fee of thirty guineas on every idiot, and there is a difference as to the number which ought to be received. The Defendant conceives that there ought to be only one at a time, the Attorney-General insisting that there ought to be a competent number. What is a competent number he has afforded me no means of ascertaining. I am told of a corporation which ought to consist of a master, co-brethren, and sisters, and that the master is charged with the performance of spiritual duties. The whole revenue ought not therefore to be applied for the support of the poor insane persons, and there are no documents nor any evidence shewing what proportion ought to be applied to their use. Under the circumstances of this case, it would be in vain to direct any inquiry, and I apprehend that I cannot do better than consider the means of accommodation afforded by the present house, which was built in 1760, as limiting the number of poor persons who ought to be maintained.

I think that the master is not entitled to receive the fee of thirty guineas; and that the 380*l.* now in the hands of Mr. *Robert Clarke* ought to be secured.

The

(*a*) 3 *Mer.* 524.

1836.

ATTORNEY-GENERAL *v.* CROOK.

The two sums of 128*l.* 1*s.* 11*d.* and 28*l.* 2*s.* 6*d.* received for timber appear to have been applied by the Defendant to his own use, and I think he must account for them, and I decree as follows: —

Dismiss with costs so much of the information as seeks a declaration that the Defendant is bound to perform divine service in the chapel for the benefit of the inhabitants of *Holloway*, and also so much thereof as seeks a declaration that leases of the charity lands ought not to be granted except at the actual improved value thereof without fine or foregift, and as prays that the Master may inquire whether any and what proceedings ought to be adopted to set aside leases. Declare that the Defendant, as master of the hospital, is bound to receive into the hospital, and to support there out of the rents and profits of the charity estates so many poor idiots or insane persons as can be conveniently received, supported, and protected in the present hospital house. Refer it to the Master to inquire how many idiots or poor insane persons, with one or more proper person or persons to take care of them, can properly be received, supported, and protected in the said house; and let the Master approve of a scheme for the due support and protection of such number of idiots or poor insane persons as he shall find can be properly received and supported there. Let the Defendant pay the costs up to this time of so much of the suit as relates to the support and maintenance of a competent number of idiots in the said hospital, and to the scheme for that purpose. Let the Defendant pay into Court the 380*l.* stated to be now in the hands of *Robert Clarke*, and the two sums of 128*l.* 1*s.* 11*d.* and 28*l.* 2*s.* 6*d.* timber money. Reserve further directions and subsequent costs.

1836.

MILLER *v.* KNIGHT.

March 9.

Where an infant heir is declared by the decree of the Court to be a trustee for a purchaser, the Court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary.

THE bill was filed for the purpose of having an infant heir declared a trustee for a purchaser, and, the fact that the infant was a trustee having been established by evidence, the decree was made accordingly.

Mr. *Pemberton*, for the Plaintiff, submitted that, under the 12 *W.* 4. *c.* 60. *s.* 12., the Court was authorised to direct a conveyance to the purchaser by the same decree. A case had occurred lately in the Court of Exchequer (*a*), where the Court said that the more regular course was to make applications of this kind upon petition, but that observation was made with reference to an attempt to obtain an order for a conveyance by an infant trustee upon motion, and did not apply to an order at the hearing.*

The MASTER *of the* ROLLS said, he would inquire into the practice of the other courts, and on a subsequent

(*a*) *Anon.* 1 *Younge & Collyer*, 75.

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* In *Fellows* v. *Till* (5 *Sim.* 319.) and in *Prytharch* v. *Havard* (6 *Sim.* 9.) the Vice-Chancellor refused to make an order for a conveyance by an infant trustee at the hearing.

In *Broom* v. *Broom* (now reported in 5 *Mylne & Keen*, 443.) Sir *John Leach* made an order for a conveyance by an infant trustee at the hearing.

In *Neve* v. *Bine* the Master of the Rolls (Sir *C. Pepys*) at the hearing thought the order should be made upon petition; but the case of *Broom* v. *Broom* (not then reported) having been subsequently brought to his attention, he directed the conveyance to be made without a petition.

In *Walter* v. *Merry* (6 *Sim.* 328.) the Vice-Chancellor made an order similar to that made by Sir *John Leach* in *Broom* v. *Broom*.

1836.

MILLER *v.* KNIGHT.

quent day he confirmed the rule which had been laid down by Sir *John Leach* upon this subject, and which, with some fluctuation, had received the sanction of the present Lord Chancellor, and the Vice-Chancellor, that where an infant heir appeared by the decree of the Court to be a trustee, and the right of the party entitled to a conveyance was also established, a conveyance will be directed by the same decree, a petition for that purpose being unnecessary.

The MASTER *of the* ROLLS observed that he had consulted the Lord Chancellor on this point, and that his Lordship concurred in the opinion that the rule should be so laid down.

May 10.

RADCLIFFE *v.* ECCLES.

An infant tenant in tail may be ordered to convey under the 1 *W.* 4. *c.* 47. *s.* 11.

THE petition prayed that the infant, who was tenant in tail of estates, which had been directed by the decree of the Court to be sold for the payment of debts, might be ordered, under the 1 *W.* 4. *c.* 47. *s.* 11., to make a conveyance to the purchaser. An objection was taken, on the part of the purchaser, that there was no mention of a tenant in tail in the 1 *W.* 4. *c.* 47. *s.* 11., and that, under that section, the Court had, consequently, no authority to direct a conveyance by the infant tenant in tail.

Mr. *Walker*, for the petitioner, said that no distinction between a tenant in tail, and a tenant in fee was raised by the words of the section in question. The same point had arisen upon the original statute of *Anne*, enabling

1836.

RADCLIFFE v. ECCLES.

enabling infant trustees to convey; and in *Ex parte Johnson* (*a*), Lord *Hardwicke* at first entertained some doubt whether that act extended to a tenant in tail, but he finally made an order that the infant should convey by suffering a common recovery. There could be no doubt that the Court was now authorised, in like manner, to order the infant to convey by executing a deed in the manner directed by the late act for abolishing fines and recoveries.

Mr. *Chandless*, for the purchaser, suggested that the eleventh section of the act 1 *W.* 4. *c.* 47. was confined to cases in which suits had been instituted for payment of debts, and the Court had decreed the estates liable to such debts to be sold for the satisfaction thereof. Here the estates were charged with legacies, and had been decreed to be sold for the payment of such legacies, as well as of debts.

Mr. *Geldart*, for the infant, observed that the estates were not the less directed to be sold for the payment of debts, and that the case consequently did not the less fall within the eleventh section of the act, because the estates were also charged with the payment of legacies, and part of the monies raised by the sale was applicable to the payment of those legacies.

The MASTER *of the* ROLLS said, that by the words of the act, the Court was to direct the infant heir to convey the estates decreed to be sold, "by all proper assurances in the law," to the purchaser or purchasers thereof. There could be no doubt that the act extended to an infant tenant in tail, and that the conveyance must be made by the proper assurance which the law now required.

(*a*) 3 *Atk.* 559.

1836.

March 20.
April 18.

GROVES *v.* CLARKE.

By the decree made at the hearing of the original cause, it was referred to the Master to approve of a proper settlement to be made on *S. G.*, a married woman, and for that purpose any of the parties were to be at liberty to lay proposals before the Master.

No question was raised at the hearing as to the children of *S. G.*

Before any proposals were laid before the Master, *S. G.* died.

Held, on a supplemental bill filed by the husband against the surviving child of the marriage and her husband, that the decree enured for the benefit of the children.

BY the decree in the original cause, made on the 19th of *April* 1834, it was referred to the Master to approve of a proper settlement to be made on the Defendant *Sarah Groves*, of her share of the residuary estate in the bill mentioned; and for that purpose any of the parties were to be at liberty to lay proposals before the Master for such settlement.

On the 30th of *October* 1834, before any further proceedings were had in the cause, *Sarah Groves* died, and *William Groves*, having obtained letters of administration of the personal estate and effects of his late wife, filed a supplemental bill against *John Clarke* and *Eliza* his wife, the surviving child of the late *Sarah Groves* and her husband, by which he claimed to be entitled to the whole of the share of his late wife in the residuary estate directed to be settled, subject to such right, if any, as *Eliza Clarke* might have in the said share. *Mary Salter*, the only other daughter of the Plaintiff and his late wife, died without issue before the filing of the original bill.

The Defendants by their answer submitted that they were entitled to have a provision made out of the residuary estate for them, or for the Defendant *Eliza Clarke*, the only surviving child of the Plaintiff and his late wife.

The question was, whether the Plaintiff was entitled under the circumstances, in exclusion of *Eliza Clarke*, to the share of his late wife in the residuary estate directed to be settled.

Mr.

1836.

GROVES v. CLARKE.

Mr. *Spence* and Mr. *Dixon*, for the Plaintiff.

In *Murray* v. Lord *Elibank* (*a*), where a reference had been made to the Master to approve of a particular settlement to be made by Lord *Elibank* on Lady *Elibank* and her children, and Lady *Elibank* died while the settlement rested only in proposal, Lord *Eldon* held that the right of the children was not affected by the death of the wife; there a settlement was expressly decreed to be made upon the children, and the case does not establish that the claim of children, in such a case, is founded upon any principle of equity, independent of contract or of decree, as is shewn by Sir *Thomas Plumer*, after an elaborate review of the authorities, in *Lloyd* v. *Williams*. (*b*) "The law," says that learned Judge, "gives the parent a right to dispose of his property, a power of disinheriting his children; and therefore how a child can come into Court to claim a settlement out of its parent's property, it is not easy to comprehend. The wife might have disappointed the claims of the child, even after a decree for a settlement on her and her issue. She might have come into Court and have consented to give up the property, and her issue would have been remediless. If the equity could not be set up against the mother, on what ground can it be supported against the father, after the death of the mother?" That Lord *Alvanley* did not suppose there was any substantive equity in the issue is clear from the case of *Macaulay* v. *Philips* (*c*), which is the converse of the present case. There the husband died while the settlement directed by the decree rested in proposal; and Lord *Alvanley*, after great consideration, held that the whole of the property survived to the wife, and that if the wife had died first, the husband would have taken the

(*a*) 10 *Ves.* 84. (*b*) 1 *Mad.* 450. (*c*) 4 *Ves.* 15.

1836.

GROVES v. CLARKE.

the whole by survivorship. The authorities shew, therefore, that there is no abstract right in the children independent of contract or decree, and here the decree is for a settlement on the wife only.

In the present case the Plaintiff was a married woman, already provided for by her husband. There was sufficient reason, therefore, for excluding her from the benefit of the settlement; but even if it be admitted that the order was erroneous, and that it ought to have directed a provision for the children as well as for the mother, that order cannot now be rectified: *Johnson* v. *Johnson*. (*a*) In a case before the late Lord Chancellor of *Ireland*, in the matter of *Ann Walker* (*b*), Sir *Edward Sugden* recognises the principle that children have no separate and independent interest. "The nature of the wife's equity," he observes, "is to secure a portion of the fund for herself, and the right of the children follows that of the wife; her equity is to a settlement, which from its very nature should provide for the children after the mother's death. Their right is entirely dependent upon her will; she cannot defeat their right and preserve her own, but she can waive her right, and so defeat theirs." In the present case the effect of the decree is to give a right to the wife only; it must be inoperative, when the wife is dead; and it has been decided that, after the wife's death, the husband is not compellable to make a settlement of her *choses in action* upon the children: *Scriven* v. *Tapley*. (*c*) In *Steinmetz* v. *Halthin* (*d*), where the suit was instituted by the trustee of the property bequeathed to the wife, Sir *John Leach* was of opinion that the wife's equity and the consequential right of the children to a settlement attached upon the filing

(*a*) 1 *J. & W.* 472.
(*b*) *Lloyd & Goold*, 2.
(*c*) *Ambl.* 509.
(*d*) 1 *Glyn & Jam.* 64.

1836.

GROVES v. CLARKE.

filing of the bill; and, though the wife died before putting in her answer, the children were held to be entitled to a settlement as against the assignees of the bankrupt husband. This case goes much farther than *Macaulay v. Philips*, and is, indeed, incapable of being reconciled with any of the previous authorities.

Mr. *Pemberton* and Mr. *Sharpe*, *contrà*.

This case is, in reality, free from all difficulty. All the cases that have been cited recognize the decision in *Murray* v. *Lord Elibank*, which is not distinguishable from the present case, except in the circumstance that the order does not contain in terms an express direction for a settlement upon the children. But that circumstance is wholly immaterial; no settlement of the wife's equity is ever made without including the children, and an order for a settlement upon the wife necessarily includes, therefore, a settlement upon the children. But supposing the order to be erroneous, and that it ought to have directed a settlement upon the children as well as upon the wife, the form of the order cannot affect the merits of the case, and the only result would be the necessity of incurring the additional expense of having it set right by an application to the Court. In *Johnson* v. *Johnson* (*a*) such an application was refused, but only on account of the long acquiescence of the son. In *Macaulay* v. *Philips* (*b*) there were no children, and no question as to the right of children ever came into discussion. The decision as to the right of survivorship in the wife was in that case, therefore, perfectly consistent with the authorities and with reason. Whether children, on the death of the mother, have a substantive right to claim a settlement, independent of any claim through

(*a*) 1 *J. & W.* 472. (*b*) 4 *Ves.* 15.

1836.

GROVES v. CLARKE.

through the mother, is a point on which judges have differed. Sir *W. Grant*, in *Murray* v. *Lord Elibank* (*a*), inclined to the opinion that the children had a substantive independent equity, and Sir *T. Plumer* was of a different opinion; and that question, whenever it may come to be determined, is, no doubt, one of considerable difficulty and importance; but it does not arise here. The question here is simply, whether the wife did or did not in her lifetime waive her equity to a settlement, for if she did not, the right of the children, which is necessarily involved in the right of the wife, remains. That she could not claim it for herself, and waive it for her children, is clear from all the authorities, and the case before Sir *Edward Sugden* contains a distinct recognition of the doctrine contended for on the part of the Defendant. *Steinmetz* v. *Halthin* (*b*) is an express authority to shew that upon the filing of the bill the equity of the wife, and consequently the equity of the children to a settlement attached, so that the form of the decree becomes perfectly immaterial. The filing of the bill gives the Court jurisdiction to deal with the fund, and the Court, having jurisdiction over the fund, will never give the property to the husband, except upon the terms of making a settlement on the wife, which includes a settlement upon the children.

Mr. *Spence*, in reply.

April 18. *The* MASTER *of the* ROLLS.

On the 19th of *April* 1834, a decree was pronounced in a cause to which the Plaintiff, and *Sarah Groves*, his now deceased wife, and the present Defendants, were parties,

(*a*) 13 *Ves.* 1. (*b*) 1 *Glyn & Jam.* 64.

1836.

GROVES v. CLARKE.

parties, and by that decree it was referred to the Master to approve of a proper settlement to be made on the Defendant, *Sarah Groves*, of her share of the intestate's personal estate, and for that purpose any parties were to be at liberty to lay proposals before the Master for a settlement.

On the 30th *October* 1834, and before any proposal for a settlement had been carried in, *Sarah Groves*, the wife, died.

The Defendant, *Eliza Clarke*, is her daughter, and the bill is filed to have it declared by the Court what are the rights and interests of the Plaintiff, and of the Defendants, in the share of the intestate's estate to which the Plaintiff's late wife was entitled.

On the part of the Plaintiff it is contended that by the form of the decree the settlement to be made was a settlement on the wife alone, and not on the wife and her children; and that therefore the Defendant, Mrs. *Clarke*, had no interest under the decree; but that, if she had any interest, it was wholly dependent upon, and derived from the interest of her mother, and, the mother having died before any proposal was carried in under the decree, the child ceased to have any interest, and the property became absolutely vested in the Plaintiff as legal personal representative of his wife.

On the part of the Defendant it is contended that the decree in this case, as in all others of the like kind, is a decree for the benefit of the wife and her children; that the omission to state in the decree that the settlement was to be made on the children as well as on the wife was a mere slip, and wholly immaterial; and that any ambiguity which the omission might have occasioned

1836.

GROVES v. CLARKE.

sioned is removed by the direction that any of the parties should be at liberty to lay proposals before the Master.

It does not appear to me to be material that no proposal had been laid before the Master. In *Ex parte Gardner* (*a*), and in *Martin* v. *Mitchell*, cited in *Murray* v. *Lord Elibank* (*b*), there had been proposals, and that circumstance seems to have been considered as of some importance; but in *Rowe* v. *Jackson*, which is imperfectly reported (*c*), there was a decree for a settlement on the wife, and the issue of the marriage in 1772. The wife lived for some years after the decree was pronounced; no proposal was ever carried in, and this was held not to prevent the claim of the children for a settlement. So in *Murray* v. *Lord Elibank* (*d*) it is stated in the judgment, that no proposal was laid before the Master, but on her death the children were held to be entitled to a settlement.

The difference between those cases and the present is, that there the decrees were for a settlement on the wife and the children or issue of the marriage, whereas here the decree is not so, at least in form.

If the decree had been made in this particular form upon discussion, and in consequence of a question duly raised in the original cause, and the Court had thereupon determined that, from some peculiarity in this case, the wife was to be at liberty to claim a settlement for herself, without making any provision for her children, I should have held myself bound by it, and there would be no question open for consideration now.

But

(*a*) 2 *Ves.* sen. 671.
(*b*) 10 *Ves.* 85.
(*c*) 2 *Dick.* 604.
(*d*) 13 *Ves.* 6.

1836.

GROVES v. CLARKE.

But it has not been stated to me that any such question was raised in the original cause, and I conceive, that the proper question for determination at present is, whether, under the decree as it stands, the Court would have permitted the husband and the wife to make a settlement on the wife alone, without making any provision for the children.

In the common case the wife may, at any time before the settlement is made, waive the order and her right to a settlement, and by waiving her own right she gives up all claim for her children; by abandoning her own right, she abandons theirs, which is involved in hers; but if she claims for herself, all the cases shew that she must include her children in that claim; *Johnson* v. *Johnson*. (*a*) If by bill she claims a settlement for herself, not making her children parties to the suit, the ordinary decree is for a settlement on herself and her children. The children, indeed, have nothing but by her, and through her; but while her claim subsists, their interest subsists also; and if a decree for her benefit in this respect has been obtained, and she dies without abandoning her claim by what Lord *Eldon* calls some authoritative proceeding, the decree stands for the benefit of the children, and, notwithstanding the seeming discrepancies between the opinions of Sir *Thomas Plumer* and Sir *John Leach* in the cases of *Lloyd* v. *Williams* (*b*) and *Steinmetz* v. *Halthin* (*c*), it is difficult to suppose that an interest, which may and must be declared by a decree, does not, in equity, attach on the filing of the bill. In *Murray* v. *Lord Elibank*, Lord *Eldon*, adverting to that which I conceive to be established, that after a bill filed the trustees of the fund

(*a*) 1 *J. & W.* 475, 480.
(*b*) 1 *Mad.* 450.
(*c*) 1 *Glyn & Jam.* 64.

1836.

GROVES v. CLARKE.

fund cannot exercise the discretion which they would otherwise have in these cases, and observing that a different opinion had been suggested, says, "I should have supposed a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill, for decrees are only declarations of the Court upon the right of the parties when they begin to sue."

Considering that, in this case, there was no question between the wife and the children, and nothing to deprive them of such right as they had involved in the right of their mother; that a settlement upon a married woman is, without a special agreement to the contrary, always understood to involve a provision for the children, and that it is, as Sir *Thomas Plumer* expresses it in *Johnson* v. *Johnson* (*a*), the constant rule of the Court, when it makes a settlement to embrace the interest of the children as well as of the parents, I am of opinion that in this case, and notwithstanding the peculiar form of the decree, the Court would not have sanctioned a settlement for the benefit of the wife alone without regard to her children; and, consequently, that the decree upon the death of the wife enures for the benefit of the children.

But then it is said, that here there is only one child, and that a married woman, who is provided for, and not in want of a settlement. But this a circumstance which, I think, I cannot at present attend to. If a settlement had been proposed, it would have embraced the interest of Mrs. *Groves*'s children generally, as well those she had, as those she might have; if it appeared that one of her children was provided for, I will not say that that circumstance might not have affected the terms of the settle-

(*a*) 1 *J. & W.* 480.

settlement as to that child. But all I can now do is to declare that the Defendants, in right of the Defendant *Eliza Clarke*, are entitled to the benefit of the decree of the 19th of *April* 1834, and to refer it to the Master to approve of a settlement to be made upon the children of Mrs. *Groves* out of the estate to which the Plaintiff is entitled in her right.

1836.

GROVES *v.* CLARKE.

BRIERLEY *v.* WALMSLEY.

March 21. 28.

THIS was a motion on the part of the Defendant to discharge for irregularity an order, obtained by the Plaintiff, for the common injunction to restrain proceedings at law.

Under the tenth of the New Orders of *December* 1833 the common injunction may be obtained on any day out of term to which the seal may be adjourned.

The Defendant entered his appearance to the bill on the 2d of *March*, and the time for answering expired on the 10th of *March*. The third seal commenced on the 8th, and motions were continued until the 11th of *March*, on which day the common injunction for want of an answer was obtained by the Plaintiff.

Mr. *Kindersley* and Mr. *K. Parker*, in support of the motion, contended that, before the New Orders, no injunction could be obtained on any day, except a seal day, and that although motions might be continued after the seal day, injunctions, which the party was not prepared to move for on the seal day, could not be moved for on any day to which the seal was adjourned; *Rowe* v. *Jarrold* (*a*), *Sharp* v. *Ashton*. (*b*) The question was,

(*a*) 5 *Mad.* 45. (*b*) 2 *V. & B.* 412.

1836.

BRIERLEY v. WALMSLEY.

was, therefore, whether the New Orders had introduced any alteration of the practice in that respect. The Chancery Commissioners had, in their report, stated that it would be expedient to allow the common order *nisi* for dissolving injunctions to be obtained upon petition of course at the Rolls, as well as upon motion, and the twenty-third of the first set of New Orders was framed in pursuance of that recommendation. But that order introduced no alteration whatever in the practice which required that such motions should be made on a seal day, nor did it extend the same indulgence which was given to parties seeking to dissolve orders *nisi* for injunctions to parties asking for injunctions. The tenth of the orders of *December* 1833 got rid of the former practice, but that part of it which provides that in every cause for an injunction to stay proceedings at law, if the Defendant do not plead, answer, or demur within eight days after appearance, the Plaintiff shall be entitled, as of course, upon motion to such injunction, does not imply that such a motion can be made, except in the usual way upon a seal day.

Mr. *Pemberton*, *contrà*, relied upon a case of *Edwards* v. *Burgess*, before the Vice-Chancellor, where the Plaintiff filed exceptions to the answer for insufficiency on the 9th of *February* 1836, and the Vice-Chancellor granted the common injunction, upon the Plaintiff's exceptions to the answer being allowed, on the 13th of *February*, which was several days after the commencement of the seal; and afterwards, on the 17th of *February*, the Plaintiff obtained an order to extend the common injunction to stay trial, no objection being made on the other side to the time at which the common injunction had been obtained. The New Orders would embarrass, instead of facilitating, the practice of the Court, if they were to receive the

1836.

BRIERLEY v. WALMSLEY.

the construction contended for on the part of the Defendant. No object was answered by requiring that, out of term, the common injunction should only be obtained on a seal day; and, on the other hand, great inconvenience would be occasioned by adhering to the old practice, which it was obviously the object of the New Orders to amend.

Mr. *Kindersley*, in reply.

Even when seal days were much less frequent than they are at present, Plaintiffs were obliged to wait till the next seal day, if the eight days expired in the interval between the seals. The first application to the Vice-Chancellor in the case cited was *ex parte*, and it is not suggested that his Honor's attention was drawn to the point upon the motion to extend the injunction to stay trial.

The MASTER *of the* ROLLS observed that, when the motion was made to extend the common injunction in the case before the Vice-Chancellor, it was open to the counsel on the other side to take the objection here insisted upon, and the point was probably discussed. If, upon inquiry, it should appear that the rule laid down by the Vice-Chancellor was, that a party should be at liberty to obtain the common injunction on any day in the course of the seal, that was a rule which his Lordship should have much satisfaction in following. A party might make a motion of this sort on any day in term, and it was reasonable that he should have the same liberty, consistently with the ordinary regulations of the Court, on any day out of term when motions were made. If the seal were extended beyond one day, there seemed to be no reason why a motion for an injunction for

1836.

BRIERLEY v. WALMSLEY.

for want of answer should not be made on any day in the course of the seal.

March 28.

On a subsequent day his Lordship said, that he had communicated with the Vice-Chancellor on this subject, and that his Honor considered the order for the common injunction in *Edwards* v. *Burgess* to have been regularly obtained. The Vice-Chancellor was of opinion, that under the tenth of the New Orders of *December* 1833, which provided that "in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled, as of course, upon motion, to such injunction," the plaintiff was entitled to the injunction out of term on any day on which motions were made, without being obliged in any case to wait for the next seal.

His Lordship held, therefore, that the order now complained of was regular. The motion must, therefore, be refused, but, as there was a reasonable doubt as to the practice, without costs.*

* A similar point arose in *The Earl of Ferrers* v. *Fisher*, on a motion made before the Lord Chancellor on the 24th of *May* 1836, to discharge an order of course for a messenger, obtained on the 30th of *March* to which day the seal had been continued, the sheriff's return to the attachment having been made on a day between the seal day and the 30th of *March*. The Lord Chancellor gave no opinion upon the point of practice, the defendants having precluded themselves by subsequent acts from taking advantage of any irregularity in the order of the 30th of *March*, even if that order had been irregular.

1836.

STOKES *v.* HOLDEN.

Jan. 21
May 24.

WILLIAM STOKES the elder, by his will dated the 5th of *November* 1816, devised and bequeathed to his son, *William Stokes* the younger, all and singular his freehold messuages, lands, tenements, and hereditaments, and all his personal estate and effects whatsoever, to hold to him, his heirs, executors, administrators, and assigns, upon trust that out of the rents, issues, and profits given and devised to him, and by sale thereof he *William Stokes* the younger, his heirs, executors, or administrators, should pay and discharge all the testator's debts and funeral expenses, and all legacies and charges thereinafter given and chargeable; and the testator thereby gave and bequeathed to his grandson, *William Holden*, when he should attain the age of twenty-one years, the sum of 500*l.*, without interest; and, if the said *William Holden* should die before he attained the age of twenty-one years without lawful issue, the testator directed the same to be paid amongst the surviving children of the testator's daughter, *Sarah Holden*, in equal shares, as they respectively attained the age of twenty-one years; but if the said *William Holden* died before that time, leaving lawful issue, the same to be paid to such issue, in equal parts and proportions; and the testator thereby gave and bequeathed to the children of his daughter, *Sarah Holden*, then living, or who might thereafter be born of her body, and the survivors of them, the sum of 1000*l.*, to be divided between them in equal shares, when they should respectively attain the age of twenty-one years, without interest, to be paid to them in manner therein mentioned,

Where a legacy was given to a person when he should attain the age of twenty-one, and if he should die under that age without issue, over; and the legatee committed a felony, and underwent the punishment to which he was sentenced for the offence before he attained twenty-one, which punishment by the 9 *G.* 4. *c.* 32. *s.* 3. operates as a pardon, and restores the felon to his civil rights, it was held that the legatee, upon attaining twenty-one was entitled to the legacy.

1836.

STOKES v. HOLDEN.

tioned, to their separate use. Provided always, that if any of the said children should die before he, she, or they attained the age of twenty-one years, having lawful issue, the share of such children so dying to be divided amongst such issue. And the testator further directed, that if his daughter, *Sarah Holden* should die during the minority of her children, the said *William Stokes* the younger should appropriate the sum of 40*l.* a year towards their support and maintenance during their minorities, as he or they should in their own judgment think proper, reducing such allowance in proportion as they severally attained the age of twenty-one years, and their legacies became payable and vested. And the testator appointed *John Hart*, *Simon Stokes*, and *William Stokes* the younger, executors of his will.

The testator died in *July* 1819, leaving *William Stokes* the younger, his only son and heir-at-law, and three children of his daughter, *Sarah Holden*, namely, *Ann Holden*, *William Holden*, and *Emma Holden*, surviving him; and his will was proved by the executors named therein. The personal estate of the testator was exhausted in the payment of his debts.

In *February* 1829, *William Stokes* the younger died intestate, leaving *Mary Stokes*, his widow, and the Plaintiffs, *Ann Stokes*, and *Mary Stokes* the younger, his only daughters and coheiresses-at-law.

In *January* 1833, *William Holden*, being then under age, was tried at the quarter sessions for the county of *Stafford*, and convicted of felony, for stealing a goose. He was sentenced to one month's imprisonment for the offence, and underwent that punishment.

William

1836.

STOKES v. HOLDEN.

William Holden attained his age of twenty-one years on the 17th of *July* 1834, and upon his claiming the legacies of 500*l.*, and the third part of the 1000*l.* given by the will of *William Stokes* the elder, doubts being entertained as to the effect of the felony upon his right to the legacies, the present bill was filed by the co-heiresses of *William Stokes* the elder, against *William Holden*, *Ann Holden*, and *Emma Holden*, for the purpose of raising the legacies bequeathed to the Defendants, and the Attorney-General was made a party for the purpose of having the question decided, whether the legacies given to *William Holden* when he should attain the age of twenty-one, did or did not pass by forfeiture to the Crown upon his conviction.

Mr. *Tinney* and Mr. *Daniel*, for *William Holden*.

There can be no doubt that the first legacy of 500*l.* is a contingent legacy; and it is equally clear, that the share of the 1000*l.* so far as it is payable out of real estate, which is the only fund left to satisfy it, is a contingent legacy; for although, where there is a gift of personal estate to a man when he shall attain twenty-one, the legacy vests, and the period of payment only is postponed, it is different where the legacy is a charge upon real estate to be raised at a future time, for, in that case, a contingent interest only is given; *Pawlett* v. *Pawlett* (*a*), *Smith* v. *Smith* (*b*), *Yates* v. *Phettiplace*. (*c*)

The legacies, therefore, being contingent, the question is, whether they did or did not vest in the Crown, *William Holden* not having attained his majority until after the expiration of the month's imprisonment which he underwent, which punishment, by the late act of the 9 *G.* 4.

(*a*) 1 *Vern.* 321.
(*b*) 2 *Vern.* 92.
(*c*) 2 *Vern.* 416.

1836.

STOKES v. HOLDEN.

9 *G.* 4. *c.* 32. *s.* 3.* has all the effect of a free pardon, and restores the party who has suffered it to all his civil rights. In *Roberts* v. *Walker* (*a*) it was decided that property, accruing to a felon before the term of his transportation had expired, was forfeited to the Crown, on the ground that the felon was incapable of acquiring property until he had undergone the punishment which, by virtue of the statute, would operate as a pardon, and restore him to his civil rights. Here the circumstance, which was wanting in *Roberts* v. *Walker*, has actually happened, and *William Holden* is entitled to the legacies given to him on his attaining the age of twenty-one, unless it can be shewn that a contingent interest vested in the Crown before it could by possibility vest in the legatee himself.

The statute of *Prærogativa Regis* 17 *Ed.* 2. gives all the chattels of a felon to the Crown; and *Staunforde* (*b*), the first commentator on that statute, in his definition of the word "chattel," says that it includes "a right of action." Now a contingency is not a right of action; for no action can be brought for a contingent interest, nor can the grant or release of a contingent interest operate at law except by way of estoppel. The subjects of forfeiture are defined by the text writers on this subject

* The ninth section is as follows: Whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital who have undergone the punishment to which they were adjudged, be it therefore enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the Great Seal, as to the felony whereof the offender was so convicted.

(*a*) 1 *Russ. & Mylne*, 752. (*b*) *Staunf. Prerog.* 44.

1836.

STOKES v. HOLDEN.

ject to be all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath or is entitled to in his own right; *Hawkins's Pleas of the Crown* (*a*); *Com. Dig.* (*b*); *Bacon's Abr.* (*c*) At one time it was doubted whether a trust was not liable to forfeiture; and a case is put by *Staunforde* (*d*), that if a felon has in his possession goods under a contract of bailment, the Crown is entitled to the goods discharged from the contract; but in none of the books is it laid down that any interest, except a present interest, either in possession or in action, can pass by forfeiture to the Crown. In *Bullock* v. *Dodds* (*e*) it was held that the felon's incapacity to acquire property continued until the expiration of the whole period of his punishment, when the statutory pardon operated; but this is the first attempt which has been made to extend the operation of the forfeiture beyond the period at which the felon recovered his civil rights.

Mr. *Wray*, for the Crown.

The gift of the share of 1000*l.*, so far as it consists of personal estate, is clearly a vested legacy. But whether the property of a felon be vested or contingent is immaterial so far as the right of the Crown by forfeiture is concerned. It is well settled that every thing in the nature of personal estate, whether in possession or contingency, whether a right of action, a possibility, or a trust, passes to the Crown; and having once passed to the Crown, no subsequent incident can take such interest out of the Crown. A power of revocation passes

(*a*) Book 2. c. 49. s. 9.
(*b*) Tit. *Forfeiture.*
(*c*) vol. iii. p. 266., 5th ed. *Forfeiture*, B.
(*d*) *Staunf. Prerog.* 46.
(*e*) 2 *B. & Ald.* 258.

1836.

STOKES v. HOLDEN.

passes to the Crown by forfeiture, and it can hardly be contended that the contingent interest in question stands upon higher ground, in respect to exemption from forfeiture, than a power of revocation. A contingent interest may be made the subject of contract, and sold for a valuable consideration, and if the person entitled to it become bankrupt, it will pass, as a part of his property, to his assignees. The very authorities cited on the other side shew that every species of valuable property will pass by forfeiture to the Crown, and the reason given for it is that the Crown may be enabled to bring offenders to justice, and support the courts in which justice is administered. In *Bullock* v. *Dodds* (*a*) Lord *Tenterden* says, that *catalla* in the old statutes comprehend every kind of personal property whatever. The form of the inquisition for ascertaining what goods a felon may have died possessed of is as general as possible, comprehending all trusts, possibilities, &c. It is argued in this case that, because *William Holden* did not attain the age of twenty-one years until after the expiration of the month's imprisonment, the statutory pardon gave him a title to the contingent legacies when they vested in possession. But this argument is founded upon the fallacy, by which it is assumed that the pardon had a retrospective operation. It is manifest that the pardon only restored the felon to his civil rights from the date of the pardon, and could not devest out of the Crown a right which had once attached. The Crown was as much entitled to the contingent interest of the felon as it would have been to a bond payable at a future period, which period might not accrue until after the expiration of the punishment; or as the assignees of a bankrupt would have been entitled to a contingent interest, which might not fall into possession until after the bankrupt had obtained his certificate.

Mr.

(*a*) 2 *B. & Ald.* 258.

Mr. *Tinney*, in reply, admitted that, if the contingency had vested in possession before the expiration of the term of imprisonment, the Crown would have been entitled to the benefit of it; but it was impossible for the Court to hold that the Crown could be placed in a better situation than the legatee himself, and be entitled to a benefit before it had accrued, and after the period at which the felon, by virtue of the statutory pardon, had regained all his civil rights.

1836.

STOKES *v.* HOLDEN.

The MASTER *of the* ROLLS. *May* 24.

The question reserved for consideration in this case was, whether a legacy, to which *William Holden* was entitled under the will of *William Stokes*, the testator in the cause, was forfeited to the Crown.

The legacy was charged on the testator's real estate, and given to the legatee when he should attain the age of twenty-one years. It was said, on the one hand, that the personal estate was exhausted in paying debts; and it was admitted, on the other hand, that, if the legacy could only be paid by means of the charge upon the real estate, it was contingent until the legatee attained twenty-one years of age.

In the month of *January* 1833, the legatee, not being twenty years of age, was convicted of stealing, and sentenced to a month's imprisonment, which he underwent, and was then discharged. He afterwards, and on the 17th of *July* 1834, attained his age of twenty-one years. The legacy then became vested, and payable, and it is claimed by the Crown as having been forfeited by the conviction of the legatee for the offence which he committed.

1836.
STOKES v. HOLDEN.

For the legatee, it was alleged that a contingency is not forfeitable; that by the statute of the 9 G. 4. c. 32. s. 3. the punishment has the like effect and consequences as a pardon under the Great Seal, and that, as the legacy did not vest until after the punishment was endured, the right to it was not forfeited.

It is clear that the offence committed by the legatee subjected him to forfeiture, and the only question is, whether the contingent legacy was forfeitable. *Hawkins* (*a*) says, "It seems agreed that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath or is entitled to in his own right, and not as executor or administrator to another, are liable to forfeiture. Also it seems to be settled that a bond taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of felony, are as much liable to be forfeited as a bond made to him in his own name, or a lease in possession." None of the words used in this description of the things liable to forfeiture apply to contingencies; but it was argued, that any thing that could be granted or assigned, or which might be the subject of a valid contract in equity, was liable to forfeiture, and that a contingent legacy might be the subject of a valid contract. I need not consider the question, whether every thing which may be granted or assigned is forfeitable, because it is admitted that, at law, a contingency does not pass by deed; and I apprehend that no case can be found in which it has been held, that any other than immediate rights (grantable or assignable) are subject to forfeiture. And though a contingency may be the subject of a contract, which, when made for a valuable consideration,

(*a*) Book 2. c. 49. s. 9.

ation, a court of equity will enforce after the event has happened, yet, till the event has happened, the party contracting to purchase has nothing but the contingency, a very different thing from a right immediately to recover and enjoy the property.

By the contingency in this case, the attainment of twenty-one years of age by the legatee, was in the nature of a condition precedent to the vesting, or to the right immediately to recover and enjoy the legacy. That condition was not fulfilled at the time of the conviction, or at the time when the punishment was fully endured, being the time when the legatee was to have the benefit of a pardon. The legatee was still not entitled to the legacy, and might never have become entitled to it. It was not till long after that the vesting took place by his living to the age of twenty-one years.

There is, I believe, no direct authority on the subject, but finding it said by Chief Justice *Wray* in the case of *Manning* and *Andrews* (*a*), that "a use, so long as it is in contingency, cannot be forfeited, as if a mortgagor be attainted and pardoned mean betwixt the mortgage and the day of redemption," I think that, under the circumstances of this case, and relying on the principle on which Chief Justice *Wray* must have founded his opinion, I may safely conclude that this contingent legacy, the event upon which the contingency depended not having happened until after the punishment was endured, was not forfeited to the Crown by the preceding conviction. And I must therefore declare that the legatee is now entitled to receive it.

(*a*) 1 *Leon.* 260.

1836.

March 15, 16.

HARGREAVES *v.* ROTHWELL.

Where one transaction is closely followed by, and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction, by which the rule, that notice to the solicitor is notice to the client, has been restricted to the same transaction.

BY an indenture, dated the 24th of *October* 1827, and made between *John Nuttall*, of the one part, and the Defendants, *John Rothwell*, *Peter Rothwell*, and *Robert Kay*, of the other part, the hereditaments and premises therein described were demised and assigned for a term of 800 years by *Nuttall* to the said Defendants, their executors, administrators, and assigns, to secure the repayment of the sum of 1500*l.* and interest; and the indenture contained a trust for the sale of the mortgaged premises.

By an indenture, dated the 19th of *November* 1829, and made between *John Nuttall*, of the one part, and the Plaintiff *John Hargreaves*, of the other part, reciting, among other things, the above-mentioned indenture, it was witnessed that, in consideration of 2000*l.* advanced to *Nuttall* by the Plaintiff, *Nuttall* conveyed to the Plaintiff his heirs, executors, administrators, and assigns, the freehold and leasehold premises therein described, including the premises comprised in the indenture of the 24th of *October* 1827, subject to redemption upon repayment of the 2000*l.* and interest, and also subject to the prior mortgage to the Defendants, *John Rothwell*, *Peter Rothwell*, and *Robert Kay*.

By an indenture, dated the 1st of *November* 1830, and made between *John Nuttall*, of the one part, and the Defendants, *John Rothwell*, *Peter Rothwell*, and *Robert Kay*, of the other part, reciting the indenture of the 24th of *October* 1827, and that the Defendants, *John Rothwell*, *Peter*

1836.

HARGREAVES v. ROTHWELL.

Peter Rothwell, and *Robert Kay*, had advanced to *Nuttall* the further sum of 2200*l*., and that *Nuttall* had agreed to secure the same upon the said mortgaged premises, and upon such additional security as therein mentioned, it was witnessed that *Nuttall* for himself, his heirs, executors, &c., covenanted that the premises comprised in the said indenture of mortgage should continue to be a security, not only for the sum of 1500*l*. and interest, but for the said further sum of 2200*l*. and interest; and the indenture contained the further covenants therein mentioned for securing the repayment of the said sums and interest to the Defendants, *John Rothwell*, *Peter Rothwell*, and *Robert Kay*.

In *May* 1832 a *fiat* of bankruptcy was issued against *John Nuttall*, and the bill was filed by the Plaintiff, *John Hargreaves*, for the purpose of obtaining the benefit of his incumbrance, subject to the prior mortgage of the 24th of *October* 1827, and for that purpose it prayed that his mortgage might be declared entitled to priority over the third mortgage to the Defendants, *John Rothwell*, *Peter Rothwell*, and *Robert Kay*. The Defendants by their answer insisted that, at the time of the execution of the indenture of the 1st of *November* 1830, they had no notice of the Plaintiff's incumbrance, and it was admitted that they had no direct notice; but it appeared that *Samuel Woodcock* was the solicitor for the mortgagor and the mortgagees in all the three transactions, and the question was whether, under those circumstances, the Defendants had not constructive notice of the second incumbrance.

Mr. *Pemberton* and Mr. *Walker*, for the Plaintiff.

The rule, that notice to the solicitor is notice to the client, has been too long established, and is too firmly settled

1836.

HARGREAVES v. ROTHWELL.

settled to be shaken. In the early case of *Brotherton* v. *Hatt* (*a*), where a mortgagor made several mortgages to different persons, and all the transactions were conducted by the same scrivener, it was decreed and afterwards affirmed upon appeal that notice to the agent was good notice to the party, and consequently that they that lend last must come last, having notice of what was before lent. In *Le Neve* v. *Le Neve* (*b*) Lord *Hardwicke* cites the case of *Brotherton* v. *Hatt* with approbation, and he observes that, "in purchases, and more especially in mortgages, very frequently the same counsel and agent are employed on both sides, and therefore each side is affected with notice, as much as if different counsel and agents had been employed." In *Tunstall* v. *Trappes* (*c*) the present Vice-Chancellor held that notice to the solicitor of an unregistered judgment was actual notice to the client. The distinction that will probably be relied upon on the other side is, that it is only in the course of the same transaction that notice to the solicitor is notice to the client; but the case of *Brotherton* v. *Hatt* (*a*), which has decided the law of the Court on this point, and which cannot now be questioned, shews that the same principle applies to a diversity of transactions.

Mr. *Kindersley* and Mr. *Monro*, *contrà*.

It is no doubt true, as a general proposition, that notice to the solicitor is notice to the client, but the rule is subject to this modification, that the notice must be in the transaction wherein the solicitor is engaged, and not in any matter foreign to the business he has in hand; *Lowther* v. *Carlton*. (*d*) In *Worsley* v. *The Earl of Scarborough*

(*a*) 2 *Vern.* 574.
(*b*) 3 *Atk.* 646.
(*c*) 3 *Sim.* 286.
(*d*) 2 *Atk.* 242.

1836.

HARGREAVES v. ROTHWELL.

borough (*a*) Lord *Hardwicke* says, "It is settled that notice to an agent or counsel who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards; and it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be most dangerous to employ." Now it is admitted in the present case that no actual notice of the second transaction was given by the solicitor to the Defendants, and as the second and third transactions were perfectly distinct and unconnected with each other, the fact of the solicitor being concerned in the second transaction does not necessarily affect with notice of it his client in the third transaction. In *Warrick* v. *Warrick* (*b*) Lord *Hardwicke* observes, that the rule laid down in *Fitzgerald* v. *Fauconberge* (*c*) that the notice should be in the same transaction ought to be adhered to; and in *Steed* v. *Whitaker* (*d*) Lord *Hardwicke* said, he believed that the rule of affecting a person with notice of the title of another by reason of his agent's having notice of it had not been carried so far as to affect him with such notice, unless where the agent has it at the time of his transaction with him, and that as the notice which the attorney had of the settlement in the case before the Court was two years before the mortgage, the mortgagee could not be affected by it. In *Hiern* v. *Mill* (*e*) Lord *Eldon* expressly states, that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is concerned for the principal, and in the course of the very transaction which becomes the subject of the suit. The principle that notice to an agent, in order

(*a*) 3 *Atk.* 592.
(*b*) 3 *Atk.* 291.
(*c*) *Fitzgibb.* 207.
(*d*) *Barnard.* 220.
(*e*) 13 *Ves.* 114.

1836.
HARGREAVES v. ROTHWELL.

order to bind his principal, must be in the same transaction was recognised by Sir *John Leach*, in *Mountford* v. *Scott* (*a*), a case which is exactly in point with the present; for there the same agent acted as solicitor both for the vendor and vendee. Whether the prior transaction was or was not present to the mind of the solicitor when he drew the third indenture was an immaterial circumstance. In *Hamilton* v. *Royse* (*b*) Lord *Redesdale* said that a professional man was not bound to carry in his recollection what he had read in a former transaction; but even where the transactions were of so recent a date that they could not fail to be present to his mind, that circumstance would not affect the doctrine laid down by Lord *Hardwicke* in *Warrick* v. *Warrick*, and recognised by Sir *John Leach* in *Mountford* v. *Scott*.

Mr. *Pemberton*, in reply.

It is not necessary in this case to decide what interval of time shall elapse between two transactions in order to fix a solicitor with knowledge of one transaction, so as to bind his client with notice in a subsequent transaction; for here it is quite sufficient that *Woodcock* acted as solicitor for both parties in the last transaction to fix the Defendants with notice of the previous mortgage. The common objection to employing the same person as solicitor for vendor and vendee is, that the vendee is thereby fixed with all the knowledge of the vendor. There can be no doubt in this case, nor is it indeed disputed, that the second mortgage was actually present to the mind of the solicitor when he drew the third; but whether it was or was not is immaterial, for as the mortgagee thought fit to employ the mortgagor's solicitor, he is bound by every thing which the mortgagor knew.

(*a*) 3 *Mad.* 34. (*b*) 2 *Scho. & Lef.* 315.

knew. The marginal note in *Mountford* v. *Scott* (*a*) is not warranted by the judgment, and the erroneous assumption in the marginal note has been adopted on the present occasion in the argument on the other side. The judgment expressly negatives the proposition laid down in the marginal note and assumed in the argument, and proceeds upon the ground that the relation of principal and agent had not been constituted between the parties, and that, until such relation was constituted, the principal was not affected by any knowledge previously acquired by the agent.

The MASTER *of the* ROLLS, in the course of the argument, said he was clearly of opinion that where one transaction was closely followed by, and connected with another; or where it was clear, as in the case before the Court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, had been restricted to the same transaction. The only authority which raised the least doubt in his mind was the case before Sir *John Leach*, which had been cited at the bar, and he would not determine the present case until he had looked into that decision.

On the following day, his Lordship gave judgment as follows: —

In the marginal note to the case of *Mountford* v. *Scott*, it is said that notice to an agent, in order to bind his principal, must be in the same transaction; and this though the agent acted as attorney for the vendor and vendee. The judgment itself certainly does not lay

(*a*) 3 *Mad.* 34.

1836.

HARGREAVES v. ROTHWELL.

lay down the proposition so absolutely as it is stated in the marginal note; but the case came upon appeal before Lord *Eldon*, and is reported in *Turner* v. *Russell* (*a*), where it appears that Lord *Eldon*'s judgment turned upon a point entirely different, which rendered the question of notice wholly immaterial. The point upon which Lord *Eldon* decided the case was that, where deeds are deposited for the particular purpose of obtaining credit, the person with whom the deeds are deposited has no lien upon them for what is due to him in respect of monies previously advanced. But Lord *Eldon* notices the ground of the Vice-Chancellor's decision, and the observations he makes on the subject of notice are extremely important. "The Vice-Chancellor," he observes, "in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say that, if an attorney has notice of a transaction in the morning, he shall be held, in a court of equity, to have forgotten it in the evening; it must in all cases depend upon the circumstances."

In these observations I entirely concur. The case of *Mountford* v. *Scott*, therefore, does not raise any obstacle that affects the view which I took of this case, and I am clearly of opinion that the Plaintiff is entitled to priority in respect of the second mortgage.

(*a*) page 274.

1836.

DE TASTET *v.* LE TAVERNIER.

Jan. 25, 26. *April* 22.

DE TASTET *v.* SMITH.

SMITH *v.* DE TASTET.

THE original bill, which was filed on the 19th of *April* 1825, by *Fermin De Tastet* the elder against *Charles le Tavernier* and *Maurice Rubichon*, assignees of the estate and effects of *Vincent Talochon*, better known by the name of *Père Elizée*, prayed that an account might be taken of what was due to the Plaintiff under an indenture of assignment dated the 29th of *March* 1811, and that the funds in court payable in respect of a legacy of 5000*l.*, bequeathed to *Père Elizée* by the late Duke of *Queensbury*, might be transferred to the Plaintiff.

Principles upon which the meaning of the term "insolvent" in the 46 *G.* 3. *c.* 135. *s.* 1. is to be determined. Embarrassment is not to be confounded with insolvency; but where a man's means of present payment are so crippled, and his embarrassment is so great that he cannot proceed with and carry on his business in the usual course of trade, he is insolvent, without reference to the consideration whether the whole of his property when converted into money and realised would be sufficient to pay his debts; and notice of such a state of circumstances is notice of insolvency.

The case made by the bill was, that *Père Elizée* and *Philip Lebrun*, who carried on business in co-partnership as chemists, being indebted to *Fermin De Tastet* in the sum of 4110*l.*, on the 12th of *September* 1810, signed a joint and several promissory note for the payment of that sum, with interest, to *Fermin De Tastet*; and that afterwards *Père Elizée*, continuing to be indebted on the promissory note, and being then entitled to a legacy of 5000*l.* under a codicil to the will of the late Duke of *Queensbury*, executed an indenture dated the 29th of *March* 1811, and made between *Vincent Talochon*, otherwise *Père Elizée*, of the one part, and *Fermin De Tastet* of the other part, by which, after reciting

1836.

DE TASTET v. LE TAVERNIER.

reciting the will and codicil of the late Duke of *Queensbury*, and that there was due and owing to *De Tastet* the sum of 4110*l.* and interest upon the promissory note, for better securing the payment of the said sum and interest, he assigned to *De Tastet*, his executors, administrators, and assigns, the legacy of 5000*l.* and all his interest therein, to hold, receive, and take the same and the interest thereof in trust, and for the intent and purpose that the same should be applied in the first place to and in liquidation of the said sum of 4110*l.* and interest, and after payment thereof, and of all costs and charges relating thereto, in trust for *Père Elizée*, his executors, administrators, and assigns, for his and their own use and benefit.

In *July* 1811 *Père Elizée* was declared a bankrupt, and *Charles le Tavernier* and *Maurice Rubichon* were appointed assignees of his estate and effects; and they, as such assignees, claimed to be entitled to the fund in court, payable in respect of the legacy of 5000*l.*

Tavernier put in an answer to the bill on the 17th of *June* 1825: *Rubichon* appeared to the bill, but afterwards went to *Paris* and refused to put in an answer.

Fermin De Tastet the elder died on the 29th of *February* 1832, and on the 17th of *April* 1832, his son and executor, *Fermin De Tastet*, filed a bill of revivor, and afterwards, an order having been obtained to remove *Rubichon*, and *Henry Smith* being appointed a new assignee in his stead, the present supplemental bill was filed by *De Tastet* the younger against *Smith*. A cross bill was filed by *Smith* against the Plaintiff in the supplemental bill, praying that the promissory note and assignment might be declared fraudulent and void, as against the creditors of *Père Elizée*, and that the fund in

in court, representing the legacy, might be transferred to the Plaintiff in the cross cause.

The principal ground upon which the claim of the Plaintiff was resisted by the Defendant was, that, at the time of the execution of the deed of *March* 1811, *Père Elizée* was insolvent, and that, previously to the date of the indenture of assignment, he had committed divers acts of bankruptcy, and that *De Tastet* the elder had notice of such insolvency and acts of bankruptcy. Much evidence was read upon the issue, whether *De Tastet* had or had not such notice; and some evidence was also produced, on the part of the Defendant, to shew that the debt, which was the consideration for the promissory note, was the debt of *Lebrun*, and not of *Père Elizée*.

The material question in the cause was, whether, supposing *Père Elizée* to have been insolvent at the date of the deed of *March* 1811, *De Tastet* the elder had or had not notice of his insolvency; that question depending upon another, namely, what circumstances constitute insolvency within the meaning of the 46 *G.* 3. *c.* 135. *s.* 1.

Mr. *Pemberton* and Mr. *Koe*, for the Plaintiff.

Upon the evidence of *Rubichon*, who is out of the reach of the Court as to responsibility, and who, after having executed an assignment of his claim upon the bankrupt's estate to his son, and taken an indemnity against the costs of this suit, has been examined as a witness, it would appear, if he were entitled to any credit, that previously to the dates of the promissory note and the indenture of assignment *Père Elizée* committed acts of bankruptcy by concealing himself at different times in the house of *Rubichon* himself, and once in the house of Prince *Stahremberg*, the *Austrian*

1836.

DE TASTET v. LE TAVERNIER.

ambassador. These are the only acts of bankruptcy put in issue in the cause, and they rest upon the evidence of a witness which cannot possibly be considered as entitled to any credit. As to the alleged insolvency, it is necessary to consider, first, what are the circumstances which constitute insolvency, and whether there is sufficient evidence of those circumstances in the present case; and, secondly, supposing such insolvency to be made out, whether *De Tastet* had notice of it, so as to bring him within the operation of the 46 *G.* 3. *c.* 135. which was the law in force at that time, and to invalidate the assignment of *March* 1811. The first section of that act enacts that all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date of the commission shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such act of bankruptcy had been committed; provided the person or persons so dealing with such bankrupt had not at the time of such conveyance, payment, contract, dealing, or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.

The first question which arises upon the construction of this section of the act is, what is insolvency? What are the circumstances which constitute insolvency, or which render a man insolvent so as to bring him within the meaning of this section; and that is a question of so much doubt and difficulty that in the corresponding section in the 6 *G.* 4. *c.* 16. all reference to insolvency has been omitted. This, at least, seems clear, that when the legislature used the word "insolvent" it did not mean that a man was to be considered insolvent, if he was unable to pay all his debts at the particular time

1836.

DE TASTET v. LE TAVERNIER.

time at which demand of payment was made. Stopping payment, indeed, has a sensible and definite signification, for when a man stops payment, he announces that he cannot go on. But inability to pay when a man shall be called upon for the payment of his debts is a totally different thing from insolvency; for if that proposition be denied — if inability to pay upon demand and insolvency are to be considered as convertible terms — the richest man or the wealthiest banking-house in *England* may, upon this construction, be insolvent; for no man, be his resources what they may, is at all times ready to meet all his liabilities, and the more extended his operations, and the greater his employment of capital and consequently his means of wealth, the less will be his ability to pay all demands at a particular moment. Insolvency, then, must mean where a person is in such a state that, if all his property were ascertained and collected, he would be unable to pay. To shew the invalidity of this deed, the other side is bound to make out that, at the time when the transaction took place, *Père Elizée* was in such a state that, if all his property had been realised, he would have been unable to pay his debts; and, secondly, that *De Tastet* the elder knew he was in such a state. There is no evidence to support either of those allegations.

Mr. *Tinney* and Mr. *Spurrier*, *contrà*.

A preliminary objection to the suit is, that the bill no where alleges that the subject matter of the assignment was ever taken out of the order and disposition of the bankrupt. An assignment of a legacy, which is a *chose in action*, without notice to the debtor, namely, the executor of the Duke of *Queensbury*, did not take the legacy out of the order and disposition of the bankrupt; and there is no allegation in the bill that such notice was given. If this objection be good, the Court

1836.
DE TASTET v. LE TAVERNIER.

is bound to take notice of it, though it has not been raised by the answer, for the law itself has declared that such an attempt at assignment passes nothing, but is wholly void. There is, in reality, therefore, no subject matter upon which the Court can found a decree.

Supposing, however, the assignment not to be void upon that ground, the question is, whether *De Tastet* the elder had notice of the acts of bankruptcy committed previously to the dates of the promissory note and assignment, and of the general insolvency of *Père Elizée*. As to the previous acts of bankruptcy committed by *Père Elizée*, there is abundant evidence to satisfy the Court upon that point. *Rubichon*'s evidence may be open to observation or suspicion, but it cannot be rejected, or excluded, as it is argued, from the consideration of the Court; and, in some material particulars, it is confirmed by the evidence of other witnesses. But the assignment itself was an act of bankruptcy, the debts of *Père Elizée*, at the time of the assignment, being more than sufficient to absorb the whole legacy.

The other question is, whether *De Tastet* the elder had notice of the general insolvency of *Père Elizée*, and it is argued that a state of insolvency is too vague an expression to be capable of receiving a satisfactory interpretation. But can there be any reasonable doubt as to the state of circumstances which practically, and therefore legally for the purpose of putting a rational construction upon the words of the act, renders a man insolvent? A state of insolvency is where a man is carrying on his business in a manner which is inconsistent with the usual course of dealing among solvent traders, and with the possibility of his being able to fulfil his liabilities; where, as was the case with *Père Elizée*, he is resorting to shifts, and expedients, repeatedly renewing bills in a great number of instances, and from

1836.

De Tastet v. Le Tavernier.

from time to time running away, and concealing himself from his creditors. There is, no doubt, a great difference between embarrassment and insolvency. Embarrassment is often the state of a man who has the means of satisfying his creditors, but not the present means. From such a man a security may fairly be taken; but insolvency is the state of a man, who, when all his property is realised, has not the means of paying his creditors, and that is the state contemplated by the legislature in the 46 *G.* 3. *c.* 135.

But there are authorities which sufficiently determine the sense in which the term "insolvency" is to be understood. In an anonymous case mentioned in the note to *Moss* v. *Smith* (*a*), Lord *Ellenborough* held that the insolvency mentioned in the statute in question must mean "a general inability in the bankrupt to answer his engagements." He says, indeed, that such general inability was not to be inferred from a party renewing bills in a particular instance, and there is no inconsistency in that observation with the argument on the part of the Defendant in the present case. The evidence shews that it was not in a particular instance, but in a great number of instances that bills were renewed by *Père Elizée*. In *Bayly* v. *Schofield* (*b*), Lord *Ellenborough* says, "By insolvent circumstances is meant that a person is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. Can a payment be said to be in the ordinary course when a man confesses he is obliged to pay by minute portions to each of his creditors? It is more like a distribution under a deed of composition, than a payment by a trader appearing openly at his counter. I should say that this was not the mode in which a solvent man proceeds." In *Shears* v. *Rogers* (*c*), where it had been contended in argument

(*a*) 1 *Campb. N. P.* 489.
(*b*) 1 *M. & S.* 338.
(*c*) 3 *B. & Adol.* 362.

1836.

DE TASTET v. LE TAVERNIER.

argument that to render a deed void within the 13 *Eliz. c. 5.*, it ought to appear that the party, at the time of making it, was in insolvent circumstances, Mr. Justice *Littledale* observes in his judgment, "Assuming that to be so, the question whether a party be or be not insolvent is to be determined, not only by taking an account of his debts and credits, and striking a balance, but also by looking to his conduct and the general state of his affairs." It is not necessary to shew that a man is in a state of complete insolvency in order to shew that he is in insolvent circumstances; all that is necessary for that purpose is to shew, according to the rule laid down in *Teale* v. *Younge* (*a*), that there were reasonable grounds of suspicion followed by actual insolvency. "By 'insolvent circumstances,'" says Chief Baron *Alexander*, in his judgment in that case; "the legislature cannot have meant a state of complete insolvency. If they did, they would have thrown a considerable burthen on courts and judges, in saying that payments shall not be protected when the parties making them are insolvent; for unless we suppose that reasonable grounds of suspicion existing at a particular time, followed by actual insolvency, are to be considered as sufficient proof that a man was in insolvent circumstances at that time, it does not appear to me how in one case in fifty that fact can be established." From these authorities it appears that, if the general mode in which *Père Elizée* conducted his business was not that of a solvent man in the ordinary course of trade, he was insolvent within the meaning of the act, and that such was his general conduct is abundantly shewn by the evidence.

Mr. *Pemberton*, in reply.

The preliminary objection is not raised by the pleadings; and, in point of fact, notice of the assignment was given

(*a*) *M'Cle. & Younge*, 497.

1836.

DE TASTET v. LE TAVERNIER.

given to the executor of the Duke of *Queensbury*, for a letter was sent to him inquiring whether such notice had not been previously given. None of the cases cited apply to the 46 *G.* 3. *c.* 135. In the anonymous case referred to in *Campbell*, the decision was that the plaintiff who had renewed the bills was not insolvent. In *Shears* v. *Rogers* the question arose upon the stat. 13 *Eliz. c.* 5., and had no direct application to the present case. In *Bayly* v. *Schofield* the creditor receiving a security for his debt knew that there had been a previous meeting of the creditors; and in *Teale* v. *Younge*, the bankrupt was under arrest when the payment was made to the creditor. The circumstances of these cases, therefore, were wholly dissimilar from those of the present case, and cannot be applied to it for the purpose of defining or reducing to any thing like certainty what is meant by a state of insolvency.

April 22.

The MASTER *of the* ROLLS (after stating the facts of the case).

The principal question in the cause is, whether the indenture of the 29th of *March* 1811 is valid against the creditors under the commission which issued against *Père Elizée* in *July* 1811.

First, it is said that the assignment of a legacy is not good without notice to the executors, and that in this case no such notice appears to have been given; but, as the fact of notice is not put in issue in this cause, I do not think myself at liberty to adjudicate upon that question.

Then it is argued that the debt which was the consideration for the promissory note was not the debt of *Père*

1836.
DE TASTET v. LE TAVERNIER.

Père Elizée, but of *Lebrun*, as to which I have carefully considered the evidence; and, although *De Tastet* kept the account with *Lebrun*, and there are some circumstances not clearly explained, yet, looking at the business in which *Père Elizée* and *Lebrun* were engaged as partners, at the nature of the bill transactions, and other circumstances in the case, the evidence on the whole appears to me to shew, that *Père Elizée* was liable for the debt before he signed the promissory note.

Next it is contended that part of the debt was a gambling debt, and part of it tainted with usury; but these allegations do not appear to me to be sufficiently made out.

The great point on which the assignee relies is, that when the assignment was executed, *Père Elizée* was, and by *De Tastet* was known to be, insolvent; and although the act of bankruptcy on which the commission issued took place in *May* 1811 after the date of the assignment, yet that *Père Elizée* had committed other acts of bankruptcy before that time.

It was argued that, under the circumstances, the assignment of the legacy ought to be considered as an assignment of all the property which *Père Elizée* was entitled to, and was in itself an act of bankruptcy; but I think the facts which are proved in this cause do not authorise that conclusion.

By the statute 46 *G.* 3. *c.* 135. it was provided, that any transaction with a bankrupt shall, notwithstanding any prior act of bankruptcy, be good and effectual as if no such prior act of bankruptcy had been committed, provided the person dealing with the bankrupt had not, at the time of the transaction, any notice of a prior act of

1836.

DE TASTET v. LE TAVERNIER.

of bankruptcy, or that the bankrupt was insolvent, or had stopped payment.

In this case the assignee undertakes to prove, first, that at the date of the transaction in question *Père Elizée* was insolvent, to the knowledge of *De Tastet*; and, secondly, that *Père Elizée* had committed acts of bankruptcy before the dates of the promissory note, and of the assignment.

A question was here raised as to what was meant by insolvency. Can a man be considered insolvent unless it be proved that his whole property is insufficient to pay the demands to which he is subject? Can he be said to be solvent when his means of present payment are so crippled, and his embarrassment is so great, that he cannot proceed with and carry on his business in the usual course of trade? The opinions of several eminent judges on this subject were cited. In an *Anonymous case* (*a*), Lord *Ellenborough* is reported to have said, "The insolvency mentioned in the statute (*b*) must mean a general inability in the bankrupt to answer his engagements, which was not to be inferred from his renewing bills in a particular instance." In *Bayly* v. *Schofield* (*c*), Lord *Ellenborough*, considering the meaning of insolvent circumstances in the act 19 *G.* 2. *c.* 32. says, "By insolvent circumstances is meant, that a person is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do." In the same case, Mr. Justice *Le Blanc* said, "I take insolvency as respects a trader to mean, that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent because he

(*a*) 1 *Campb.* 492. n.
(*b*) 46 *G.* 3. *c.* 135.
(*c*) 1 *M.* & *S.* 350.

1836.

DE TASTET v. LE TAVERNIER.

he may ultimately have a surplus upon the winding up of his affairs;" and Mr. Justice *Bayley* says, "I agree that insolvency means, that a trader is not able to keep his general days of payment; and that he is not to be considered as solvent because, possibly, his affairs may come round." In *Teale* v. *Younge* (*a*), the question again arose, upon the act 19 *G.* 2. *c.* 32., and Chief Baron *Alexander* says, "By insolvent circumstances the legislature cannot have meant a state of complete insolvency. If they did they would have thrown considerable burden on courts and judges in saying that payments shall not be protected when the parties making them are insolvent; for, unless we suppose that reasonable grounds of suspicion existing at a particular time, followed by actual insolvency, are to be considered as sufficient proof that a man was in insolvent circumstances at that time, it does not appear to me how, in one case out of fifty, that fact can be established." In the same case Baron *Garrow* says, "I admit that a man is not insolvent because he postpones the payment of a demand for a week or ten days, during which the creditor consents to wait, or renews a bill; and yet these are indications of a want of present power to pay." In *Cutten* v. *Sanger* (*b*), Chief Baron *Alexander* says, "that notice of a difficulty to meet particular demands only is not notice of insolvency; it must be of a more general and extensive description." In *Shears* v. *Rogers* (*c*), it being considered that a party must be in insolvent circumstances to render a conveyance to him fraudulent under the statute 13 *Eliz.* *c.* 5., a question was made, what is meant by being insolvent; and Mr. Justice *Littledale* says, "The question, whether a party be or be not insolvent, is to be determined not only by taking an account of his debts and credits, and striking a balance, but

(*a*) *M'Cle. & Younge*, 504.
(*b*) 2 *Younge & Jer.* 459.
(*c*) 3 *Barn. & Adol.* 362.

but also by looking to his conduct and the general state of his affairs."

It is clear that the statute would, in this respect, have been inoperative, if a man could not have notice of the insolvency of another without knowing at the time that the whole of his property, when converted into money and realised, would be insufficient to pay his debts; and I must, therefore, consider whether Mr. *De Tastet* had notice of the insolvency of *Père Elizée*, within the meaning of the terms insolvent, or insolvent circumstances, as interpreted by the judges whom I have named.

I pass over the evidence of his embarrassment as shewn by the state of his banking account, of his not paying his servants' wages, of his hiding himself from persons who claimed money from him, and of his pawning articles to raise money. These circumstances, however indicative of his situation, are not all of them satisfactorily proved, and are in no respect traced to the knowledge of Mr. *De Tastet;* but I think that the repeated dishonour and renewal of bills which took place before the month of *March* 1811, the letters of Mr. *De Tastet* before that time, and the evidence which is afforded of *Père Elizée*'s state at that time, and of Mr. *De Tastet*'s knowledge of his state at that time, by Mr. *De Tastet*'s subsequent correspondence, together with the situation of *Père Elizée*'s estate, as appearing on his bankruptcy, without any circumstances to shew that any material change had taken place between the date of the assignment and the date of the bankruptcy, all tend to shew — and on full consideration of the circumstances I am satisfied — that, at the date of the assignment, Mr. *De Tastet* must be deemed to have had notice, that *Père Elizée* was insolvent within the meaning of the statute.

I am

1836.

DE TASTET v. LE TAVERNIER.

I am therefore of opinion, that the first point which the assignee undertook to make out is established.

The other point is that *Père Elizée* had committed an act of bankruptcy before the date of the assignment, and upon this it is important to consider what is alleged and what is proved.

The assignee, in his cross bill and in his answer to *De Tastet*'s bill, alleges generally that *Père Elizée* executed the indenture of assignment after he had committed various acts of bankruptcy, and that, on several occasions at the end of 1810, *Père Elizée*, with intent to defeat or delay his creditors, departed from his dwelling-house, and otherwise absented himself, and in particular was concealed three times in the house of *Rubichon* in *Argyll Street*, and upon his application for admission declared that he could not sleep for fear of being arrested, and came there to avoid the importunities of his creditors; and that, previously to his first concealment in the house of *Rubichon*, he had committed an act of bankruptcy by departing from his place of abode and secreting himself in the mansion of the Prince of *Stahremberg*, the *Austrian* ambassador, at *Twickenham*, through apprehension of arrest.

Rubichon is the witness called to prove the acts of bankruptcy here alleged; and, if entire credit is to be given to *Rubichon*, he proves the concealment in his house in the latter part of the year 1810. Upon the concealment in the house of the *Austrian* ambassador, *Rubichon* fails as to the time.

Brunet also gives evidence as to another and distinct act, which by connection with the evidence of another witness,

witness, *Philippe Ponteau*, would appear to be an act of bankruptcy. (His Lordship read several passages from the evidence.)

1836.
De Tastet
v.
Le
Tavernier.

The evidence thus given is open to considerable observation. The only witness to the acts of bankruptcy particularly referred to in the bill is *Rubichon*, who was assignee of *Père Elizée* under the bankruptcy, and who interposed great delay and difficulty to *De Tastet* in the prosecution of the suit. He has, indeed, assigned his interest as a creditor, but the assignment being made to his son leaves him open to the same influence. Moreover he does not exactly specify the times when the alleged acts took place.

As to the conduct of *Brunet*, *Pacquot*, and *Ponteau*, no objection is made. It is objected that *Brunet* appears to have parted with his interest as a creditor only by his own statement of an assignment to Mr. *Le Gros;* and it is argued that the acts of bankruptcy proved by *Brunet*, *Pacquot*, and *Ponteau* are not put in issue in the cause, and therefore ought not to be relied on.

I do not think that I am at liberty to reject the evidence either of *Rubichon* or of *Brunet;* and I think there is sufficient allegation on the part of the assignee to entitle him to prove particular acts of bankruptcy; but I cannot say that Mr. *De Tastet* appears to me to have had all the means which might have been desired to meet this part of the case. As it stands, the evidence appears to me to be sufficient to sustain the fact of there being prior acts of bankruptcy; and if it were necessary for me to decide now, I should, under the circumstances of this case, dismiss Mr. *De Tastet*'s bill without costs; but, if he desires it, I will now direct an inquiry or an issue, whether *Père Elizée* committed any and what act or

1836.

DE TASTET v. LE TAVERNIER.

or acts of bankruptcy before the date of the assignment, and reserve further directions and costs.

If *De Tastet*'s bill is dismissed, a decree must be made in the other suit for payment of the fund to the assignee.

The Plaintiff elected to take an issue.

ROLLS.
Feb. 27.
April 16.

BLACKWELL *v.* BULL.

The word "family," admits of a variety of applications, and the construction to be put upon it in a particular will must depend upon the intention of the testator, to be collected from the whole context of the will.

Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust that at his wife's decease the whole of it, as well freehold as personal, should be equally divided among his children; it was held, that the testator, in the words "my family," intended to comprise his wife; and as to the testator's property devised after his wife's decease to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication as well in the real as in the personal estate.

As to the effect of a devise to the heir and another person, or to the heir and other persons on the death of *A.*, where there is no explanatory context, *quære.*

THE will of *Richard Bull*, dated the 17th of *June* 1834, was in the following words: — "In the first place, my will and wish is that my business of a cheesemonger be carried on by my wife *Sarah Bull* and my son *John Bull* jointly, for the mutual benefit of my family; and I likewise will and devise in trust all my property for the following purpose, that is to say, that at my wife's decease the whole of my property, of whatever nature or description, as well freehold as personal, shall be equally divided amongst my children, *John*, *Richard*, *William*, *Mary*, and *Caroline Bull*, their executors or assigns, share and share alike. And I hereby appoint my wife *Sarah Bull*, my son *John Bull*, and my friend *Samuel Blackwell*, executrix and executors of this my will."

The

1836.

BLACKWELL v. BULL.

The testator died shortly after the date of his will, leaving his widow, *Sarah Bull*, and *John Bull*, his eldest son and heir-at-law, and four other children, all infants, surviving him.

The will was proved by the Plaintiff, *James Blackwell*, and *Sarah Bull*; and the bill was filed by the Plaintiff against the widow and children of the testator, for the purpose of having the rights of the several parties declared, and the trusts of the will carried into execution.

The principal questions in the cause were, whether the widow, in the absence of any express limitation to her, was included in the word "family," and consequently took under the will a beneficial interest in the testator's business; and whether she was entitled, by implication, to a life-interest in the testator's real and personal estate.

Mr. *Blake*, for the widow.

Though the testator has not given any beneficial interest, in express terms, to his wife, there can be no doubt that in using the word "family" he meant to include his wife. If the word "family" were considered equivalent to "relations," and to be construed, as the latter word usually is, according to the statute of distributions, she would be entitled to one third, but if she carries on the business with her son, according to the direction of the testator for the mutual benefit of the family, she will be entitled to a moiety of the profits of the business. In *M'Leroth* v. *Bacon* (*a*) Lord *Alvanley*, looking to the whole context of the will in that case, was of

(*a*) 5 *Ves.* 159.

1836.

BLACKWELL v. BULL.

of opinion that a power to appoint for the benefit of a married woman and her family included the husband.

As to the direction that, at the decease of the wife, the whole of the testator's property, real as well as personal, should be divided among his children, there can be no doubt that, as to the personal estate, the wife will take a life-interest by implication. If she did not, there would be an intestacy till her decease, and the children would be entitled to an interest under the statute before the period pointed out by the testator. All the authorities shew that, as to personal estate, a bequest to *A.* upon the death of *B.* is a bequest to *B.* for life by implication; *Roe dem. Bendale* v. *Summerset* (*a*), *Hammond* v. *Neame* (*b*), *Bird* v. *Hunsdon* (*c*), *Crawford* v. *Trotter.* (*d*) As to real estate, a devise to *A.* upon the death of *B.* is a devise to *B.* for life by implication, if *A.* be the heir; but if *A.* is a stranger, the estate during the life of *A.* is undisposed of, and consequently descends to the heir. Thus in *Smarthill* v. *Schollar* (*e*), where *A.* devised an estate to his younger son after the death of his wife, and the question was whether the wife should take a life estate by implication, it was held that she should not; and the difference was agreed to be that, where the devise is to the heir after the death of another, there that other person shall take an estate by implication, because the intent of the devisor is manifest, that the heir shall not have it till that other person is dead; but otherwise it is, if the devise be to any other person besides the heir, for there the heir shall take in the *interim.* So in a case from the *Year-Books*, cited by Chief Justice *Vaughan* in *Gardner* v. *Sheldon* (*g*), where a man devised his goods to his wife, and that, after the decease

(*a*) 5 *Burr.* 2608.
(*b*) 1 *Swanst.* 35.
(*c*) 2 *Swanst.* 542.
(*d*) 4 *Mod.* 361.
(*e*) 1 *Freem.* 458.
(*g*) *Vaugh.* 263.

1836.

BLACKWELL v. BULL.

decease of his wife, his son and heir should have the house where the goods were, it was held that the son should not have the house during the wife's life; for though it was not expressly devised to the wife, yet the intent appeared that the son should not have it during her life, and therefore it was a good devise by implication, and the devisor's intent. A devise to *A.* and *C.*, upon the death of *B.*, or to *A.*, *C.*, and three others upon the death of *B.*, which is the present case, would, it should seem, in like manner give an estate for life to *B.* by implication, but the exact point has never been determined. In *Hutton* v. *Simpson* (*a*) it is said that a devise to *A.*, after the death of the testator's wife, would give an estate for life to the wife by implication, though *A.* was only one of four co-parceners. In the present case the testator mixes his real with his personal estate, and it was clearly his intention that the same disposition should be made of both descriptions of his property.

Mr. *Puller*, for the younger children.

The word "family" has a distinct and definite signification, and must be taken to mean children exclusive of their parents, unless there are plain expressions in the will indicating a contrary intention on the part of the testator; *Barnes* v. *Patch*. (*b*) The term "relations" has been held to be equivalent to "next of kin" according to the statute of distributions, in order to put a fixed construction upon an expression in itself vague and indefinite; but there is no authority for the proposition that the word "family" is equivalent to "next of kin;" *Brandon* v. *Brandon* (*c*), *Doe dem. Thwaites* v. *Over*. (*d*) The children, therefore, are to take the beneficial interest in the trade to the exclusion of the widow. *M'Leroth* v. *Bacon*

(*a*) 2 *Vern.* 722.
(*b*) 8 *Ves.* 604.
(*c*) 3 *Swanst.* 312.
(*d*) 1 *Taunt.* 263.

1836.

BLACKWELL v. BULL.

Bacon (*a*) was decided upon its special circumstances, and Lord *Alvanley*, in his judgment, expressly treated it as a case of exception to the general rule, that parents are not included in the word "family." As to the property not engaged in the trade, the widow takes no life estate by implication, but the words "after the decease of my wife" are to be construed distributively, and referred to the disposition which the testator had before made as to the property employed in the trade. This construction is most consistent with the plain intention of the testator, and a devise by implication is not to be raised against such apparent intention; *Boon* v. *Cornforth* (*b*), *Dyer* v. *Dyer*. (*c*)

Mr. *Wright*, for the heir, said the rule was, that the heir at law could not be disinherited by implication; and although, where an estate was given to the heir after the death of *A.*, it had been held that *A.* took a life interest by necessary implication, that necessary implication did not arise where the estate was given to the heir and another person, or to the heir and several other persons (which was the present case), after the death of *A.* There was no authority to shew that *A.* took any thing in the last-mentioned case, and, upon principle, one of two constructions must be given to such a devise. Either the whole estate during the life of *A.* descends to the heir by reason of the uncertainty of the devise, and because the heir cannot be disinherited upon conjecture; or else the interest of the heir in that part of the estate to which the implication does not extend, in other words his title by descent will be affected by the devise during the life of *A.*, to the extent only of that share of the estate which he takes in common with the other persons after the decease of *A.*; and, applying that principle

(*a*) 5 *Ves.* 159. (*b*) 2 *Ves.* sen. 277. (*c*) 1 *Mer.* 414.

principle to the present case, there being five children among whom the property is to be equally divided, the widow will be entitled only to a life interest in one fifth part of the real estate.

1836.
BLACKWELL v. BULL.

Mr. *Blake*, in reply.

The MASTER *of the* ROLLS.

It is evident that the word "family" is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect.

Under different circumstances it may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding the wife; or in the absence of wife and children, it may mean his brothers and sisters, or his next of kin, or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance, and in the case of a will we must endeavour to ascertain the meaning in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will; and applying these considerations to the present case, I am of opinion that in the words "my family," the testator clearly intended to comprise his wife. He did not contemplate any severance or separation either of his family or of the property employed in the trade, but probably considered that they would, as it may be hoped they will, continue united, enjoying together the benefit of the business. If the case should be otherwise, it may become necessary

1836.

BLACKWELL v. BULL.

to determine their separate interests, and I think that the wife and son *John* carrying on the business are first entitled to a proper remuneration for their trouble in carrying it on, and that the clear profits ought to be applied for the common benefit of the wife and children. If a separation of the family should take place, I think that each member will be entitled to an equal share of the profits; and, as to the property not engaged in the trade, though the case as regards the real estate is not without difficulty, yet on the whole will, and what appears to me the evident intention, I think the widow is entitled to a life interest in both the real and personal estate.

Declare that the wife and son, consenting to carry on the trade for the benefit of the family, are entitled to be remunerated for their trouble, and refer it to the Master to settle the amount of such remuneration. Declare that the clear profits are to be applied to the common benefit of the wife and children whilst they reside together; and that any savings thereof which may be made will belong to them in equal shares; and refer it to the Master to approve of a scheme for carrying on the trade and applying the profits thereof as aforesaid. Declare that, according to the true construction and effect of the will, the wife is entitled to an estate for life in the freehold and leasehold estate and other personal estate not engaged in trade.

1836.

PEASNALL *v.* COULTART.

Feb. 23.
March 15. 28.

A PETITION was presented by the Plaintiff, who had employed the respondents as his solicitors, praying that certain bills of costs might be delivered and taxed. The petition was heard on the 22d of *December* 1835, when, the respondents not appearing, an order for the delivery and taxation of the bills was made upon affidavit of service. The petition was, in consequence of erroneous information, given by the Six Clerk to the town agent who received instructions for presenting it, entitled in a cause between *Stephen Peasnall* and *Walter Ritson Coultart*, the real name of the Defendant being *William Ritson Coultart*.

It is not regular in a notice of motion for a four-day order to ask for the costs; but, if asked for, it is in the discretion of the Court to give or withhold them.

On the 23d of *December* the respondents gave notice to the Plaintiff that the order for the taxation of the costs was stayed, with liberty to the Plaintiff to apply at once; and the Plaintiff, therefore, gave notice to the respondents, in which notice the Defendant was erroneously called *Walter Ritson Coultart*, that he would apply to the Master of the Rolls that the Registrar might be at liberty to draw up the order made on the 22d of *December*. A motion to that effect was made on the part of the Plaintiff on the 24th of *December*, when the Master of the Rolls, after hearing counsel on both sides, granted the application, and ordered that the respondents should pay the costs of the motion. No notice was then taken of the mistake made in the name of the Defendant.

After some negotiation between the agent for the Plaintiff and the solicitors, whose bills were sought to

1836.

PEASNALL v. COULTART.

be taxed, the bills not having been delivered, notice of motion for a four-day order was on the 19th of *February* served by the Plaintiff on the solicitors.

At the hearing of that motion the objection was taken, on the part of the solicitors, that the notice of motion was entitled in a cause which had no existence. It was further objected, that the notice of motion was irregular, inasmuch as it sought for the delivery of the papers within four days after service of a writ of execution, whereas it ought to have been within four days after service of the order, it being contrary to the practice to issue a writ of execution against persons not parties to the suit; and as it also sought for the costs of the motion, which were never given in the case of a four-day order. The following cases were cited: *Verlander* v. *Codd* (*a*), *Young* v. *Goodson* (*b*), *Drewry* v. *Thacker* (*c*), *Whithed* v. *Thistlethwait* (*d*), *Collins* v. *Crumpe* (*e*), *Anon.* (*g*).

Mr. *Pemberton* and Mr. *Sharpe*, for the motion.

Mr. *Spence* and Mr. *Girdlestone*, jun., contrà.

The MASTER *of the* ROLLS observed, that in substance, and upon the merits, the Plaintiff was entitled to the order; for the solicitors, who had all the papers in the cause, and the means of correcting the mistake in the title of the cause, had kept the Plaintiff in ignorance of it, and could not be allowed to take advantage of an irregularity occasioned by their own conduct, and which, by the subsequent negociation, they had in effect waived. But

(*a*) 1 *Sim. & Stu.* 94., and *Turn. & Russ.* 94.
(*b*) 2 *Russ.* 255.
(*c*) 3 *Swanst.* 529.
(*d*) 3 *Atk.* 619.
(*e*) 3 *Mad.* 390.
(*g*) 14 *Ves.* 207.

1836.

PEASNAIL v. COULTART.

But as an order which was the foundation of a proceeding in contempt could not be made while the irregularity subsisted, his Lordship directed the motion to stand over until the Plaintiff should have an opportunity of moving for leave to amend the title of the petition presented on the 17th of *December*, and of the orders made on the 22d and 24th days of *December* respectively.

On the 15th of *March* a motion was made accordingly for leave to amend, which was not opposed by the respondents. Upon the motion for the four-day order directed to stand over, the question as to the costs was again discussed, and the same authorities were cited.

The MASTER *of the* ROLLS made the order for leave to amend, reserving the consideration of the question, whether it was regular in a notice of motion for a four-day order to ask for the costs of the application.

March 28.

On a subsequent day his Lordship said, that upon inquiry into the practice as to this point, it appeared to be the opinion of the most experienced officers of the court, that it was not regular in a notice of motion for a four-day order to ask for the costs, but, if asked for, it was in the discretion of the Court to give or withhold them. Under those circumstances, considering, on the one hand, the vexatious proceedings of the solicitors, and, on the other hand, the irregularity of the notice of motion in asking for the delivery of the papers within four days after service of a writ of execution, instead of within four days after service of the order, he thought, upon the whole, that he ought not to give costs on either side.

1836.

March 24.

SNOW *v.* POULDEN.

The testator directed the residue of his property to be invested in land, and given to *S.*, who was "not to be of age to receive this until he attained his twenty-fifth year, and to be entitled to him and his heirs male:" Held, that *S.* took a vested estate tail in the land, subject to be devested if he should not attain twenty-five; and that the rents and profits were applicable to his benefit during his minority.

THE residuary clause of the will of *Thomas Fitzherbert* was in the following words: — "The rest of my property to be invested in land, and given to my grandson, *Thomas Fitzherbert Snow*; when of age to have a commission in the army regulars at twenty-one; to remain in the army seven years, and not to be of age to receive this until he attains his twenty-fifth year, and to be entitled to him and his male heirs bearing the name of *Thomas Fitzherbert* for ever."

The question was, whether the devise to *Thomas Fitzherbert Snow* was vested or contingent.

Mr. *Pemberton*, for the devisee.

Boraston's case (*a*) determined the point raised by this devise. That case established the rule, that a gift by devise in words, which import contingency, but which do not raise a condition precedent, will give a vested interest to the devisee, subject to be devested if the contingency should not happen. In *Boraston's case* the estate was given by way of remainder after a term of eight years unto the executors, until *Hugh Boraston* should attain his full age, the rents and profits in the meantime to be applied to the purposes of the will, and when he should come to his age of twenty-one years, then he was to enjoy the estate. In *Bromfield* v. *Crowder* (*b*), where this subject was much discussed, the Court followed the rule laid down in *Boraston's case*, though the words of

(*a*) 3 *Co.* 19. (*b*) 1 *New Rep.* 313.

1836.

SNOW v. POULDEN.

of the will seemed strongly to indicate an intention on the part of the testator that the gift should not vest unless the devisee attained the age of twenty-one years. In *Duffield* v. *Elwes* (*a*), where the testator, by a codicil which was held to revoke his will, devised his freehold estates to the son of his daughter, Mrs. *Duffield*, who should first attain twenty-one, and take the name of *Elwes*, Sir *John Leach* held that Mrs. *Duffield*'s eldest son, who was not in *esse* at the time of the gift, took under it an immediate vested interest both in the estates of which the testator was seised at the date of his will, and those he purchased afterwards. That was, certainly, a strong decision, and it was afterwards reversed in the House of Lords; *Duffield* v. *Duffield* (*b*); but it was reversed upon the ground that, at the time of the gift, there was no person in *esse* who answered the description of a person who could take under the devise. In the present case there was a person in *esse*, who could take when he should attain the age of twenty-five years; and the devisee is entitled, according to all the authorities, to a vested estate tail, subject to be devested if the contingency should not take effect.

Mr. *Spence*, for the heir-at-law and next of kin.

In *Duffield* v. *Elwes* there was a residuary devise, and in *Bromfield* v. *Crowder* there was a devise over. So in *Phipps* v. *Williams* (*c*), a case recently before the Vice-Chancellor, and falling within the same class of cases, there was a devise over. In *Phipps* v. *Williams* also, as in *Duffield* v. *Elwes*, there was a residuary clause. In the present case there is no limitation over, and that circumstance is of importance in determining the

(*a*) 2 *Sim. & Stu.* 544. (*b*) 3 *Bligh. N. S.* 200. (*c*) 5 *Sim.* 44.

1836.

SNOW v. POULDEN.

the question, whether a devise shall be held to be vested or contingent, a question which must always depend upon the intention of the testator. Here, if the devise is held to be contingent, there are no limitations over to be put in jeopardy, and no intention of the testator in that respect will be defeated. There being no antecedent gift from which it can be inferred that it was the testator's intention merely to postpone the period of enjoyment, the gift must, in conformity with the principles laid down in *Leake* v. *Robinson* (*a*), and followed in the late case of *Judd* v. *Judd* (*b*), be held to take effect only at the devisee's age of twenty-five. In *Russel* v. *Buchanan* (*c*), a case recently sent to the Court of Exchequer, where the testator by a codicil declared that neither the devisee for life under his will, nor any of his issue, should, by virtue of his will, be considered as entitled to a vested interest, unless and until they should respectively attain the age of twenty-one years, this subject underwent much discussion, and the Court held, that in the event which happened, the devisee for life having died leaving several children, all of them under twenty-one, the devise by the will, being rendered contingent by the codicil, failed of effect.

Mr. *Pemberton*, in reply.

Leake v. *Robinson*, and the cases in which that authority has been followed have been determined upon principles applicable only to personal property, and borrowed, as most of the rules adopted in this court upon legacies have been borrowed, from the Roman law. In *Hanson* v. *Graham* (*d*), Sir *W. Grant* observes, that it is from the civil law that we borrow all, or at least the greatest

(*a*) 2 *Mer.* 363.
(*b*) 3 *Sim.* 523.
(*c*) 2 *Cromp. & Mees.* 561., and 4 *Tyrw.* 384.
(*d*) 6 *Ves.* 239.

1836.

SNOW v. POULDEN.

greatest part of our rules upon legacies, and particularly the rule upon the subject immediately under consideration in that case, with reference to the words by which a testator denotes his intention as to the gift taking effect under a condition precedent, or taking effect in possession. But the rules which govern bequests of personal estate, and devises of real estate, with reference to that consideration, are totally different. *Mansfield* v. *Dugard* (*a*), *Edwards* v. *Hammond* (*b*), *Goodtitle dem. Hayward* v. *Whitby* (*c*), *Bromfield* v. *Crowder* (*d*), *Doe dem. Hunt* v. *Moore*. (*e*) It is said that this devise must be held to be contingent, because there is a devise over, but whether there is a devise over or not is wholly immaterial. In all the discussions which the case of *Duffield* v. *Elwes* underwent, that circumstance was never adverted to, nor was it likely that it should have been adverted to, since in *Boraston*'s case, the very case which constitutes the foundation of the rule upon which cases of this description have been decided, there was no devise over.

The MASTER *of the* ROLLS held, that the devisee took an immediate vested interest, as tenant in tail, in the land in which the residue of the testator's personal property was directed to be invested, subject to be devested if he should not attain the age of twenty-five years, and that the rents and profits were consequently applicable to his benefit during his minority.

(*a*) 1 *Eq. Ca. Abr.* 195.
(*b*) 3 *Lev.* 132.
(*c*) 1 *Burr.* 2228.
(*d*) 1 *New Rep.* 313.
(*e*) 14 *East*, 601.

1836.

March 5, 6.

KAY *v.* MARSHALL.

Leave to plead double granted.

Principles upon which the Court proceeds in allowing double pleas.

THE bill was filed in *February* 1835 by *James Kay* against the Defendants, *John Marshall* the elder, *John Marshall* the younger, and others, and it prayed that the Defendants might be restrained by injunction from infringing the exclusive right of the Plaintiff to an invention of new machinery for preparing and spinning flax, hemp, and other fibrous substances by power, for which invention the Plaintiff had obtained letters patent, and that the Defendants might be compelled to account with the Plaintiff for the profits made by them from the use of the Plaintiff's invention.

The bill stated that in the process of spinning flax by power the skein of flax is drawn out or elongated, immediately before its being spun, by means of drawing and retaining rollers, the drawing rollers moving at a greater velocity than the retaining rollers; that in the machinery for spinning flax by power commonly in use prior to the Plaintiff's invention, the drawing and retaining rollers were placed at a distance of from twelve to twenty inches from each other, and that the Plaintiff discovered, after many experiments, that by placing the drawing rollers at a distance of two and a half inches only from the retaining rollers, the skein of flax might, when in a wet or macerated state, be drawn out and spun in such a manner as to produce a thread of a much finer and stronger texture than could be produced by the method in use prior to the Plaintiff's discovery. The bill further stated, that since the Plaintiff had obtained his letters patent the process of macerating

1836.

KAY v. MARSHALL.

macerating flax in the mode described in the Plaintiff's specification had become in a great degree unnecessary, the skein or thread of flax being by reason of the improved preparation thereof rendered capable of being sufficiently wetted for drawing by being made merely to pass through a trough of water previously to being drawn and spun, which, prior to such improved mode of preparation, was not the case. The bill alleged that the said invention for drawing and spinning flax in a wet or macerated state by means of placing the rollers at the said short distance was a new invention, and one of great public utility; and it charged that the Defendants had, in violation of the Plaintiff's exclusive right, caused great quantities of machinery to be constructed upon the principle of the Plaintiff's invention, and had used and contrived to use the same in their spinning mills at *Leeds* and elsewhere in the county of *York*, and also at *Shrewsbury* and elsewhere in *England*.

The Defendants disputed the validity of the patent on the grounds that so far as the invention was new it was useless, and that so far as it was useful it was not new; and having permitted the time for demurring to elapse, they made a special application to the Vice-Chancellor for leave to demur upon those grounds. That application was refused by the Vice-Chancellor; but, upon an appeal from his Honor's decision, Lord *Lyndhurst* gave the Defendants liberty to demur. A demurrer was accordingly filed, and came on to be heard before the Vice-Chancellor on the 9th of *June* 1835, when the Vice-Chancellor made an order, by which the demurrer was ordered to stand over, with liberty to the Defendants to bring such action as they should be advised. That order was afterwards, upon appeal,

1836.
KAY
v.
MARSHALL.

appeal, discharged by the Lord Chancellor; the demurrer to the Plaintiff's bill was overruled, and the Defendant obtained six weeks' time to answer.

The time for answering not having expired, a motion was now made, on the part of the Defendants, that they might be at liberty to file within the six weeks' time a double plea; namely, first, that the invention was not useful, and secondly that it was not new.

Mr. *Pemberton*, in support of the motion, said that the Plaintiff by his bill required accounts of great length to be set forth, by which the Defendants would be exposed to much inconvenience and possible injury from a needless exposure of the commercial transactions in which they were engaged, and that the case, therefore, fell within the principle laid down in *Gibson* v. *Whitehead* (*a*), where the Court intimated that under such circumstances leave to plead a double plea would be granted upon a special application. The Defendants were precluded from putting in a single plea which would meet the whole issue, because the Plaintiff had taken out a single patent for two distinct objects purporting to be inventions. One of those objects, the mode of maceration, was new, but useless; the other, namely, the placing of the rollers at a shorter distance, was useful, but not new, and indeed had no claim whatever to the title of an invention. The issue to be determined was, whether the patent was valid or invalid, and the validity of the patent could not possibly be put in issue except by pleading the two pleas, first, that where the alleged invention was new it was not useful; and secondly, that where it was useful it was not new.

Mr.

(*a*) 4 *Mad.* 241.

1836.

KAY v. MARSHALL.

Mr. *Kindersley* and Mr. *Booth*, *contrà*.

This is a second dilatory, the demurrer to the Plaintiff's bill having been over-ruled, and the Court will not allow the Plaintiff's right to a discovery to be eluded by a second dilatory. It is doubtful whether, under an order for time to answer, even a single plea can be put in; *Barber* v. *Crawshaw*. (*a*) With respect to the present motion for leave to put in a double plea, such an application, where the Defendants are under an order for time to answer, and five weeks out of the six have been suffered to elapse, is without precedent. Double pleading was never permitted in courts of equity until the recent case of *Gibson* v. *Whitehead* (*b*), and then under circumstances wholly inapplicable to the present case. In *Whitbread* v. *Brockhurst* (*c*) Lord *Thurlow*, in giving the reason why the defendant should not be permitted to bring two points, upon which the cause depends, to issue by his plea, says "the answer is because, if two, he may as well bring three points to issue; and so on, till all the matters in the bill are brought into issue upon the plea; which would be productive of all the delay and inconvenience which pleading was intended to remedy." It is, no doubt, too late to contend that a double plea may not, in certain cases, be put in; but the principle upon which the Court has acted in allowing a double plea may be collected from the very few instances in which the indulgence has been granted. Where the Plaintiff has so shaped his case that it cannot be met by a direct and single issue—where he puts his title to relief upon two substantive grounds, either of which would be sufficient—the Court will allow a double plea, because a single plea, in such a case,

(*a*) 6 *Mad.* 284.
(*b*) 3 *Mad.* 241.
(*c*) 1 *Bro. C. C.* 404., and 2 *V. & B.* 153. *n.*

1836.

K.
v.
MARSHALL.

a case, could not possibly meet the alternative claim of the Plaintiff. Thus in *Gibson* v. *Whitehead* (*a*) the plaintiff sought to charge the real estates of the testator by an alternative allegation that the testator had by his will subjected his real estates to the payment of his debts, or, if that were not the true construction of the will, that he was a trader at the time of his death, and that consequently his real estates were liable under the act of parliament. Here it was impossible to meet the alternative charge of the Plaintiff by a single plea, and the Court allowed the Defendant to meet both allegations by a double plea. In *Hardman* v. *Ellames* (*b*) leave to plead double was given under similar circumstances. In that case the plaintiff claimed as heir-at-law, and stated in his bill that the ancestor from whom he derived his title died in 1759, but he did not state the time at which his title accrued. He further stated that there was an outstanding term of ninety-nine years, of which the termor and his representatives had continued in possession down to the period at which he filed his bill. The defendant could only meet the claim of the plaintiff by shewing that the title of the plaintiff, if any, accrued in the year 1759, and that there had been adverse possession ever since, and also by shewing that the termor and his representatives had never entered into possession, or received the rents and profits. This could not be effected by a single plea, and the Court accordingly gave leave to plead double. In the present case the title of the Plaintiff is single; he claims only as patentee; there is no alternative claim, and the single point at issue is the validity or invalidity of the patent. There is no pretence, therefore, in this case for putting in a double plea. A plea that the alleged invention was not new, or a plea that the

(*a*) 3 *Mad.* 241. (*b*) 5 *Sim.* 640., and 2 *Mylne & Keen*, 732.

the invention was of no public utility, would meet the whole case of the Plaintiff, and, if sustained, would be a bar to the discovery which he claims.

1836.
KAY
v.
MARSHALL.

Mr. *Pemberton*, in reply.

The double plea, which is now sought, is not a dilatory, but goes to the whole substance and merits of the Plaintiff's bill; and nothing but a double plea could accomplish that object. It is admitted by the Defendants, that the Plaintiff's alleged discovery is partly new and partly useful; but that part which is new is useless, and that part which is useful is not new. A plea, therefore, which should go to only one part of the alleged invention, or which should aver generally the invalidity of the patent, could not possibly meet the case of the Plaintiff. There is no authority for the proposition that a double plea will only be allowed where the Plaintiff has put his case upon an alternative claim; but if there were, the present is exactly such a case as would fall within the supposed principle, for the title of the Plaintiff depends upon two distinct claims, each of which must be separately dealt with, in order to determine the single question at issue, namely, the validity of the patent. As to the alleged delay of five weeks, no delay could be imputed to the Defendants, while the time for answering was unexpired, and no indulgence is sought from the Court, as the Defendants are ready to put in their pleas within the time limited for answering.

The MASTER *of the* ROLLS. *March* 6.

This was a motion for leave to file a double plea. The bill was filed on the 9th of *February* 1835, and the usual time for demurring having expired, special leave

1836.

KAY
v.
MARSHALL.

to demur was given on the 15th of *April* following, and in pursuance of such leave a demurrer was put in, which was argued on the 2d of *June* before the Vice-Chancellor, who made an order, which was appealed from. The appeal did not come on to be heard till the 1st of *February* 1836, when the demurrer was over-ruled, and the Defendant obtained six weeks' time to answer.

The first question that arises is, whether the Defendants, after obtaining six weeks' time to answer, had a right to put in a plea without making any application to the Court. It has been decided in several cases, that where leave is given to answer, the defendant may, under such leave, put in a plea; *Anon.* (*a*), *Jones* v. *The Earl of Strafford* (*b*), *Roberts* v. *Hartley.* (*c*) In *De Minckuitz* v. *Udney* (*d*), Lord *Eldon*, after having looked into all the cases upon this point, says, that though, if he had had to settle the practice originally, he should not have held a plea to be an answer within the meaning of an order for time to answer, he could not contradict the various authorities that it was to be so considered. The rule may, therefore, be considered as sufficiently settled, that a single plea may be put in under the order for time to answer.

The next question is, whether the Defendants can have that leave, which is the object of the present application, namely, leave to put in a double plea within the time allowed for answering. I consider the time within which it is asked that the double plea may be put in material: in some of the cases, considerable stress is laid upon the circumstance whether the defendant

(*a*) 2 *P. Wms.* 464.
(*b*) 3 *P. Wms.* 79.
(*c*) 1 *Bro. C. C.* 56.
(*d*) 16 *Ves.* 355.

defendant did or did not desire to extend the time; and here there is no application to extend the time.

Upon the subject of double pleas there has been considerable argument at the bar. It has been said that a double plea is only allowed in cases where there is a sort of double or alternative claim in the bill. In the case cited for the purpose of supporting that proposition there is such an alternative claim, but there is nothing to shew that this is the principle, still less the only principle, upon which the Court proceeds in allowing double pleas. It appears to me, that the principle upon which the Court proceeds depends very much upon the extraordinary inconvenience that might arise if the defendant were not allowed, in many cases, to plead double.

How far, and in what cases, a defendant may, if he answer, protect himself against answering fully, has been a subject much controverted, and upon which judges have differed. A defendant denying the principal fact upon which the plaintiff rests his claim to discovery, is entitled to protect himself by plea against answering; and if his plea be accompanied by an answer, the answer must be so framed as to support, but not to over-rule the plea. Lord *Thurlow*'s objection to bringing two points in issue by plea has been adverted to in the argument. "Why," says Lord *Thurlow*, "it may be asked, should not the defendant be permitted to bring two points, on which the cause depends, to issue by his plea? The answer is, because, if two, he may as well bring three points to issue; and so on, till all the matters in the bill are brought into issue upon the plea." This objection is not applicable to the modern practice of allowing double pleas, because, though a defendant may file a single plea without an application to the

1836.

KAY
v.
MARSHALL.

Court, he cannot put in a double plea without such an application, and the liberty, if sought to be abused, is easily restrained. The general rule that, if the defendant answers, he must answer fully, however established, is, no doubt, a rule that, in many cases, occasions great hardship to the defendant. The only other defence is a demurrer or plea. A demurrer is not a convenient mode of defence by reason of the admission, which it involves, of the case made by the bill; and the rules as to pleas in this Court are of such exceeding nicety and difficulty, that it is almost impossible for parties who have a right to plead to take full advantage of their right. The only way of saving Defendants from the hardship to which in many cases they would be subjected by making a full discovery is, by affording to them such facilities as can, by the rules of the Court, be afforded with respect to pleas. I do not think a great indulgence is sought from the Court, where, by obtaining it, the Defendants will obtain only that which the Court thinks right. With respect to this particular case, if it be a matter of indulgence, I think the Defendants, under all the circumstances, are entitled to it. The Defendants are required by the bill to set forth accounts of extraordinary length at a great expense, and at the risk, though this does not appear, of making an inconvenient exposure of their affairs. This application, therefore, must be granted; but, according to the course of the Court, upon the condition of the Defendants paying the costs.

1836.

COSTER *v.* COSTER.

March 1.

Where in a suit for the administration of a testatrix's estate, the Master's report was delayed in consequence of another pending suit, and it appeared upon the petition of one of the residuary legatees, an infant, and a married woman, that she had been deserted by her husband, and that there was likely to be a large residue, inquiries were directed to ascertain the facts stated in the petition, and the probable amount of the petitioner's fortune, and what would be a proper allowance for the past and future maintenance of the petitioner.

THIS was the petition of *Mary Ann Coster Bartlett*, by her mother and next friend. The petitioner was one of three residuary legatees under the will of *Susannah Brown*. The bill was filed on the 12th of *August* 1830, by the residuary legatees, for the purpose of having the personal estate of the testatrix administered, and the residue ascertained and secured for the benefit of the Plaintiffs. The executors, by their answer, stated that they had possessed themselves of the personal estate of the testatrix, and that they had paid a few legacies, but that, by reason of a suit having been instituted against them by *Samuel Brown* and his wife, in which a claim was made against the estate of the testatrix, they had been advised not to proceed in the further administration of the estate of the testatrix until that claim was adjusted; but they believed that, after payment of the debts and legacies of the testatrix, a considerable surplus of the personal estate of the testatrix would remain. The decree, made in the administration suit on the 11th of *June* 1830, directed the usual accounts; but the Master, by reason of the pendency of the suit instituted by *Brown* and his wife, had not been able to make his report.

The petition, after setting forth these facts, stated, that a few days before the filing of the bill, the petitioner, then *Mary Ann Coster Squarer*, being at that time only fourteen years of age, intermarried with *Jacob Bartlett*, an attorney at *Teignmouth*, without the privity or consent of her mother; that she lived with her husband from the time of their marriage until the

1836.

COSTER v. COSTER.

17th of *February* 1835, when her husband wholly abandoned her; that since that time she had received from her husband the sum of 12*l.* 10*s.* only towards her maintenance; and that she and her child, the only issue of the marriage, had lived with, and, with the exception of the before mentioned sum, been wholly supported and maintained by, her mother. The petition further stated, that no claim had been established against the estate of the testatrix in the suit instituted by *Brown* and his wife; that the petitioner believed that the clear residue of the estate of the testatrix, after payment of her debts and legacies, would exceed 14,000*l*; that a considerable part of the estate of the testatrix was invested in the public funds, or on other securities bearing interest, and that a large sum of money was now payable, and would hereafter accrue due in respect of such interest.

The petition prayed that the executors of the testatrix might be directed to pay to the petitioner's mother the sum of 50*l.* for the past maintenance of the petitioner; and to pay to the petitioner, or otherwise to apply for her maintenance and support, the annual sum of 80*l.*, by equal half yearly payments.

Mr. *Hallett*, in support of the petition, cited *Atherton* v. *Nowell* (*a*), where an order was made upon an application of a wife, under special circumstances, to be allowed maintenance for herself and child out of a fund in Court, to which the husband had become entitled in right of his wife, the husband opposing the application; and *Guy* v. *Pearkes* (*b*), where advances which had been made to a married woman deserted by her husband for her maintenance, on the credit of a fund in Court to which

(*a*) 1 *Cox*, 229. (*b*) 18 *Ves.* 196.

which she was entitled, were ordered to be reimbursed out of the capital without the husband's consent.

1836.
COSTER
v.
COSTER.

The MASTER *of the* ROLLS directed a reference to the Master to inquire whether the petitioner was married or not, and, if married, when and to whom, and whether any settlement was made or agreed to be made at the time of her marriage, or since by her husband. And further to inquire, what was the amount, or probable amount, of the petitioner's fortune, and what sum it would be proper to allow for the past and future maintenance of the petitioner, and out of what fund, with liberty to state special circumstances.

STEWART *v.* Lord NUGENT.

June 29.

Plea to a bill for discovery, filed after a demurrer to a plea at law, allowed.

THIS was a plea to a bill for discovery in aid of a defence to an action at law, and for a commission to examine witnesses abroad.

The Defendant, Lord *Nugent*, on the 20th of *January* 1836, commenced an action against the Plaintiff in equity, who was the proprietor of the *Courier* newspaper, to recover damages for an alleged libel in an article, which appeared in that newspaper, reflecting upon the conduct of Lord *Nugent* as governor of the *Ionian* islands. The declaration was delivered on the 3d of *February*, and on the 1st of *March* the Defendant at law put in two pleas; first, not guilty; and, secondly, a plea of justification. The plea of justification set out a number of general charges against Lord *Nugent* without specifying dates or particulars; and Lord *Nugent*, being advised that even if those charges were proved, they

1836.

STEWART v. Lord NUGENT.

they would not amount to a justification, filed a replication to the first plea, and a special demurrer to the second plea on the 3d of *May*.

On the 21st of *May* the Defendant at law filed his bill in this Court, stating in detail the matters charged generally in his plea of justification, alleging that it was necessary, in order to support that plea, that he should have a discovery, and a commission to examine witnesses in the *Ionian* islands, and praying for such discovery and commission accordingly.

To that bill the Defendant in equity put in a plea, stating that he had, previously to the filing of the bill, demurred to the Plaintiff's plea to the action as bad and informal, and that an issue at law had by such demurrer been raised, and was then pending touching the validity of the plea in point of law. The plea proceeded as follows: — "And this Defendant doth aver that the said demurrer is good in law, and will be allowed, and that the said plea is and will be held to be bad, invalid, and insufficient in law, and that no issue can or ever will be raised in the said action in which the truth of the said plea so secondly pleaded by the said Plaintiffs therein, or of any of the matters and things therein averred or contained, will be tried; and that the Plaintiff's said bill is brought in aid of a defence to the said action which is bad and invalid in law, and the truth of which never can or will be tried or inquired into."

Mr. *Pemberton* and Mr. *Bethell*, in support of the plea.

It is not necessary, for the purpose of sustaining this plea, to consider what the general law of this Court is in

1836.

STEWART v. Lord NUGENT.

in allowing a Defendant to obtain discovery in aid of his defence to an action at law. Anomalous, no doubt, it is, that the Court of Chancery, which confines itself to questions of property, and does not afford its assistance in cases of personal wrong, or injury, such as actions for criminal conversation, assault and battery, and the like, should nevertheless permit a Defendant in an action for libel to file a bill for discovery in this Court in aid of his defence. That point has, however, been determined since the case of *Thorpe* v. *Macaulay* (*a*), and it is not now open to contend that a bill for discovery may not be filed, where an issue of fact is to be tried in an action proceeding *ex delicto* for a civil remedy. But in the present case, the Plaintiff at law having put in a special demurrer to the plea, there is only an issue of law to be tried, and there is consequently no proceeding at law which can be aided by a discovery or a commission. If the demurrer is allowed, the plea is bad and cannot be tried. If the demurrer be over-ruled, judgment will be given for the Defendant upon the plea, and no discovery will be required. If the argument on the other side be, that there may still be a possible case in which an issue of fact may be joined at law, in that case there may be a ground for filing a bill for discovery, but so long as there is only an issue of law upon the record, such a bill cannot possibly be sustained, and the plea in equity must be allowed. The rule of the Court is, that a discovery will be granted in those cases only where the exigencies of the proceeding at law require it. *Shackell* v. *Macaulay*. (*b*)

Mr. *Kindersley* and Mr. *Stinton*, *contrà*.

The plea at law set forth the matters charged as a justification too generally, and was therefore liable to objection

(*a*) 5 *Mad.* 218.

(*b*) 2 *Sim. & Stu.* 79.; and upon appeal in the House of Lords, 1 *Bligh, N. S.* 96.

1836.

STEWART v. Lord NUGENT.

objection in point of form, but it was in substance a good plea. Now it is in the constant practice of courts of law to allow a plea to be amended, and that even after demurrer. In point of fact leave has been obtained to amend the plea in the present case, but it is admitted that the Court cannot consider that fact, or look out of the record for the purpose of determining the present question. The Court may, however, look to the practice of the courts of common law for the purpose of considering the truth of the averment in the Plaintiff's plea, that after a demurrer to the plea, no issue of fact can ever be joined. In *Tidd's Practice* (*a*) it is laid down that it is now the common practice to give leave to amend a plea after demurrer, though it was formerly otherwise.

If therefore the plea at law may be amended, there is an end to the argument that a bill of discovery cannot be entertained because an issue of law can never be raised. The averment in the plea, that the demurrer is good in law, and will be allowed, and that the plea at law must and will be held to be bad, and that no issue can or ever will be raised in the action, is a mere gratuitous assumption which is conclusively refuted by the fact that the plea has been amended, and that therefore an issue at law may be raised; or, if we are not entitled to use that fact, at any rate by the acknowledged practice that a plea may be amended, and that an issue of law is a possible case. A plea, when amended, is still the same plea, in like manner as a bill, after amendment, is still the same bill; no valid objection to the discovery, therefore, can be taken upon the ground that the plea, when amended, ceases to be the same plea. The plea to the bill of discovery is founded upon the

(*a*) Page 708. 9th edit.

the supposition that the demurrer at law must and will prevail, and that the plea at law cannot be amended and it is shewn as well by fact as by authority that the plea is capable of being amended, and that the foundation for the plea in equity fails.

The MASTER *of the* ROLLS.

I have no doubt whatever in this case. In an action for libel a plea of justification is put in by the Defendant at law. The bill for discovery is not filed in that stage of the proceedings; if it had been so filed, the application of the case of *Shackell* v. *Macaulay* might have had to be considered. But, there being a previous demurrer put in to the plea of justification for the purpose of trying the question, whether the defence at law was or was not a valid defence, a bill for a discovery and for a commission to examine witnesses is filed in this Court. The argument addressed to me assumes that there is no proceeding at law in which the discovery, if obtained, can be used; but it is said that there may by possibility arise a case in which the answer of the Defendant can be used, and the Court is called upon to compel the Defendant to put in an answer which, as the record stands, cannot be used, because by possibility a court of law may, upon a proper application, allow the plea to be amended, and the plea, which is now admitted to be bad, will then be a good one. It is contended, singularly enough for the present purpose, that the plea, as it now stands, will, when amended, be still the same plea; in other words, that a good plea and a bad one are identical. For some purposes it may be considered as the same; but for the purpose of obtaining a discovery in this Court, the argument that a good plea and a bad one are to be considered as exactly the same cannot possibly be successfully maintained. The plea must, therefore, be allowed.

1836.

Feb. 12, 13.
April 14.

BRAITHWAITE *v.* BRITAIN.

Where introductory words in a will directing payment of all the testator's just debts were followed by specific devises to two of the executors, it was held, upon the whole context of the will, that the testator had not charged his real estate generally with the payment of debts.

The claim of a creditor against the assets of a deceased partner was held not to be barred, under the circumstances, by the statute of limitations.

Mortgagees, with notice of a specific charge for payment of debts upon devised estates, were held, notwithstanding releases of the executors to the devisees (such devisees being themselves two of the executors, and the releases not shewing that the charge had been raised and paid), to be bound to see to the application of the mortgage money.

THE bill was filed on the 3d of *April* 1833, by *Sarah Braithwaite*, against the representatives of *John Britain* the elder, and other persons who were interested in, or claimed liens upon, the estate of *John Britain* the elder; and it prayed that an account might be taken of what was due to her in respect of certain deposits which she had made with the partnership firm of *John Britain* the elder, deceased, and the Defendants, *John Britain* and *William Thackwray*; and that it might be declared that she was entitled to be paid out of the real and personal assets of *John Britain* the elder.

Previously to *March* 1824, *John Britain* the elder, and the Defendants *John Britain* and *William Thackwray*, were bankers in partnership together, and were indebted to the Plaintiff in respect of deposits made by her from time to time between the 1st of *April* and the 13th of *November* 1823, in the sum of 2500*l.*, on which they allowed interest.

John Britain the elder died in *March* 1824, leaving his nephew, *William Britain*, his heir-at-law, and his nephews *John* and *George Britain* surviving him; and having duly made his will, dated the 8th of *October* 1823, whereby he first ordered and directed all his just debts and testamentary expenses to be paid and discharged; and after bequeathing certain pecuniary legacies

1836.

BRAITHWAITE v. BRITAIN.

legacies and annuities, he gave and devised unto his nephew, *William Britain*, his heirs and assigns, all and singular his lands, tenements, and hereditaments, situate at *Sinderly*, subject nevertheless, and the testator thereby charged the said premises at *Sinderly* with the payment of the sum of 3800*l.*, to be paid or accounted for by his said nephew unto his executors thereinafter named, at the end of twelve calendar months next after his decease, with interest for the same, after the rate of 4*l.* per cent. per annum. And the testator gave and devised unto his nephew *John Britain*, his heirs and assigns, all and singular his messuage or dwelling-house, lands, tenements, and hereditaments whatsoever, with their appurtenances, situate and being at *Kirklington*, subject nevertheless, and the testator thereby charged the said last-mentioned premises with the payment of the sum of 1400*l.*, to be paid or accounted for by his said nephew *John Britain*, unto his executors thereinafter named, at the end of twelve calendar months next after his decease; and the said testator thereby gave and bequeathed unto his nephew *John Britain*, and to his nephew *George Britain*, to be equally divided between them, share and share alike, all and singular his share and interests of and in the banking concern wherein he was a partner, carried on under the firm of *John Britain* the elder, *John Britain* the younger, and *William Thackwray*. And the testator declared it to be his will and intention, that the said last-mentioned bequest should extend not only to such share of profits, benefit, and advantage as should be due, owing, or belonging to him as such partner as aforesaid at the time of his decease, but also to all such sum or sums of money as should at that time be due and owing to him from the said banking concern, on the balance of his private account, and on every other account relating to the said banking concern; and after specifically bequeathing

1836.

BRAITHWAITE v. BRITAIN.

queathing certain other parts of his personal estate, as to the said several sums of 3800*l.* and 1400*l* thereinbefore directed to be paid or accounted for by his said nephews, *William Britain* and *John Britain*, out of the several estates thereinbefore devised to them; and also all the rest, residue, and remainder of his real and personal estate and estates whatsoever, chargeable nevertheless with the payment of all his just debts and testamentary expenses, and of the several annuities and legacies thereinbefore bequeathed, he gave, devised, and bequeathed the same and every part thereof unto his nephews, the said *William Britain*, *John Britain*, and *George Britain*, their heirs, executors, administrators, and assigns absolutely as tenants in common, share and share alike; and the testator appointed his said nephews, *William Britain*, *John Britain*, and *George Britain*, executors of his will.

John Britain and *George Britain* alone proved the will on the 6th of *July* 1824, and possessed themselves of the personal estate of the testator.

William Britain, the devisee of the testator's estate at *Sinderly*, and *John Britain*, the devisee of the estate at *Kirklington*, after the death of the testator, entered into possession of those estates respectively, and of the receipt of the rents and profits thereof.

By an indenture dated the 20th of *April* 1826, between *William Britain* and *George Britain* of the one part, and *John Britain*, of the other part, reciting, that by the will of the testator, *John Britain* the elder, the 3800*l.* charged on *Sinderly*, and the 1400*l.* charged on *Kirklington*, were given to the testator's nephews, *William Britain*, *John Britain*, and *George Britain*, without noticing that they were made chargeable with the payment

ment of the testator's debts; and after further stating that *William Britain*, *John Britain*, and *George Britain* had apportioned and divided between themselves their respective shares of the said sums of 3800*l.* and 1400*l.*; and that all accounts between them as to those sums had been settled to their mutual satisfaction, it was witnessed, that *John Britain* and *George Britain* released to *William Britain* all the *Sinderly* estate, and all the claims which they might have against *William Britain* on account of the 3800*l.*, or their shares therein. And by another indenture of the same date between *William Britain* and *George Britain* of the one part, and *John Britain* of the other part, it was witnessed that *William Britain* and *George Britain* released to *John Britain* all the *Kirklington* estate, and all the claims which they might have against *John Britain* on account of the 1400*l.*, or their shares therein.

Shortly after the execution of these deeds, and in *May* 1826, *William Britain* executed a mortgage of the *Sinderly* estate to *William Morton*, to secure the repayment of 1800*l.* and interest. In the year 1830 the Defendants, Sir *Charles Dalbiac* and *George Dalton* lent 3000*l.* to *William Britain*, 1200*l.* to be applied to his own use, and 1800*l.* to pay off *Morton*, and by deeds of lease and release dated the 15th and 16th of *April* 1830, the *Sinderly* estate was conveyed as a security for the repayment of the 3000*l.* and interest to the Defendants, Sir *Charles Dalbiac* and *George Dalton*, who claimed, by their answer, the benefit of that mortgage in priority to the Plaintiff. In *November* 1830 *William Britain* executed to *George Douthwaite* a further charge of 1000*l.* on the *Sinderly* estate, and the benefit of this further charge was claimed by the Defendants, *William Lawson*, and *Gabriel Fielding*, in priority to the Plaintiff.

1836.

BRAITHWAITE v. BRITAIN.

In the year 1828 *John Britain*, claiming to be absolutely entitled to the *Kirklington* estate, deposited the title deeds relating to that estate, with the Defendants, Messrs. *Swann* and Co., to secure a balance amounting to 2479*l.* due to them on an account. The Defendants, Messrs. *Swann* and Co., by their answer claimed to be entitled to the benefit of that equitable charge on the *Kirklington* estate in priority to the Plaintiff.

The Plaintiff having in vain endeavoured to obtain payment by applications to *Thackwray* and *John Britain*, at length brought an action against them in *Hilary* term 1832. *Thackwray* confessed judgment; *John Britain* defended the action, and delayed the proceedings by obtaining an injunction which was afterwards dissolved; and on the 8th of *September* 1832 a verdict was obtained against him for 2200*l.* A few days afterwards a *fiat* in bankruptcy was issued against him, and the Defendants, *Wilks* and *Gaunt*, were appointed his assignees.

The questions raised in the cause were first, as to the construction of the will, whether the whole of the testator's real estate was subjected to the payment of his debts, or only the *Sinderly* and *Kirklington* estates made liable to the specific sums respectively charged upon them; secondly, as to the liability of the estate of the deceased partner, whether the claim against that estate was barred by the statute of limitations; and, thirdly, whether the Defendants claiming under legal or equitable charges were or were not, under the circumstances, bound to see to the application of the mortgage money, or entitled to be considered as purchasers for valuable consideration without notice.

Mr.

Mr. *Pemberton* and Mr. *Geldart*, for the Plaintiff.

1836.

BRAITHWAITE v. BRITAIN.

The right of the creditor of a partnership to follow the assets of a deceased partner is now too firmly established to be disputed, and upon that right the claim of the Plaintiff is founded. The testator, *John Britain* the elder, has specifically charged his estates at *Sinderly* and *Kirklington* with the payment of the sums of 3800*l.* and 1400*l.* respectively towards the satisfaction of his debts; but, independently of that specific charge he has used general words sufficient to affect the whole of his estate, both real and personal, with a trust for the payment of his debts. Not only the general introductory direction for the payment of all his just debts, but the whole frame of the will shews that, *ultrà* the specific devise of the sums charged upon the estates at *Sinderly* and *Kirklington*, the surplus of the testator's real estate was made liable to the payment of his debts. Even if the will had not rendered the real estate liable, the testator was at his death a trader within the meaning of the 47 *G.* 3. *c.* 74., and under that statute the Plaintiff is entitled to come against his real estate. The defence raised against the claim of the Plaintiff is, first, that she is barred by the statute of limitations, no demand having been made against the estate of the deceased partner from *March* 1824, when the testator died, up to the time of filing the bill, a period of more than nine years. It is clear that there can be no foundation for that defence, where a trust is once created for the payment of debts, whether as to real or personal estate: *Burke* v. *Jones* (*a*), *Jones* v. *Scott*. (*b*) With respect to a trust for payment of debts as to personalty, though Sir *John Leach* was of opinion in *Jones* v. *Scott*, that such a trust was nugatory and wholly inoperative as against the executor,

(*a*) 2 *V. & B.* 275. (*b*) 1 *Russ. & Mylne*, 255.

1836.

BRAITHWAITE v. BRITAIN.

ecutor, Lord *Brougham* decided that it would, equally with a trust as to real estate, prevent the operation of the statute, and though an appeal was brought from his decision to the House of Lords, that appeal was not prosecuted, and the law in this respect as to both real and personal estate must be taken to stand upon the same footing. In *Hargreaves* v. *Michell* (*a*), Sir *John Leach* held that a charge for payment of debts is equivalent to a trust, and as the statute of limitations does not run against a trust, it is immaterial in the present case whether it be trust or charge for the purpose of preventing the operation of the statute. There is another reason why the statute of limitations cannot apply to this case; interest has been paid by the surviving partner within six years from the death of the deceased partner, and that is sufficient to take the case out of the statute as against the estate of the deceased partner. In *Burleigh* v. *Stott* (*b*) where an action had been brought against the administrator of a surety on a joint and several promissory note, it was held that a payment on account of the note within six years, and during the lifetime of the deceased partner, by a joint contractor, operated as a promise to pay by all the joint contractors, and, consequently, rendered the administrator liable. So in *Wyatt* v. *Hodson* (*c*), which was after Lord *Tenterden*'s act (*d*), it was decided that payment of interest by one of several joint contractors took a debt out of the statute of limitations against all.

By the introductory words of the will, the testator directs all his just debts to be fully paid and discharged, and he afterwards directs the sums charged upon the *Sinderly* and *Kirklington* estates to be paid to his executors

(*a*) 6 *Mad.* 326.
(*b*) 8 *B. & Cress.* 36.
(*c*) 8 *Bing.* 309.
(*d*) 9 *G.* 4. *c.* 14.

ecutors and accounted for. These directions are in effect equivalent to a direction to his executors to pay all his just debts, and it has been held that such a direction will operate as a condition imposed upon the executors to satisfy the testator's debts as far as all the property which they derive under the testamentary disposition will extend, whether real or personal: *Henvell* v. *Whitaker*. (*a*) The case of *Warren* v. *Davies* (*b*), which will probably be cited on the other side, was a case of great peculiarity. There the testator in the first place directed his debts and legacies to be paid by his executors thereinafter named; he afterwards devised a real estate to his son in fee, and in a subsequent part of his will named that son and another person his executors; and the Master of the Rolls held that the estate specially devised to his son, not being given to his son in the character of his executor, was not charged with the payment of debts and legacies within the intention of the testator. The distinction between *Henvell* v. *Whitaker* and *Warren* v. *Davies* is extremely fine, but no such distinction can be fairly applied to the present case. The principle that in a will so framed, as to the introductory words, as that in *Warren* v. *Davies*, whatever comes to the hands of the executor, *quà* executor, must be applied to the payment of debts, is not affected by the distinction upon which the Master of the Rolls proceeded in that case, namely, that the testator meant to separate the gift to his son from the disposition of his property to the executors. Unless the Court should be of opinion, therefore, that there is the same intention here as in *Warren* v. *Davies* on the part of the testator to separate the devise of the *Sinderly* and *Kirklington* estates, subject to the charges, from the condition which he had imposed upon his executors as to the whole of his

(*a*) 3 *Russ.* 343. (*b*) 2 *Mylne & Keen*, 49.

1836.

BRAITHWAITE v. BRITAIN.

his property, the case of *Warren* v. *Davies* will not influence its determination. One of the leading rules in the construction of wills is to give, if possible, an effective interpretation to every clause in the will. Now, the general intention to be deduced from the introductory clause to make all his property of whatever description liable to the payment of his debts is not inconsistent with the specific charge upon the *Sinderly* and *Kirklington* estates; whereas, if the general intention be cut down by holding that the real estates were not charged *ultrà* the *Sinderly* and *Kirklington* estates, nor those estates *ultrà* the specific sums charged upon them, the introductory clause becomes inoperative. Another circumstance distinguishing this case from *Warren* v. *Davies* is that wherever these legatees are named, they are always expressly described as executors. Whatever came to their hands, therefore, as such executors, they were bound to apply to the payment of debts. They were bound as such executors, under the trust created by the will, to see to the application of the monies produced by the real estates of the testator; or at any rate they were bound, under the specific charge, to see to the due application of the monies charged upon the *Sinderly* and *Kirklington* estates. There is no evidence that any part of the sums so charged has ever been raised or applied to the payment of the testator's debts; and there is no foundation, therefore, for any argument that those estates were ever exonerated from their charges. The Defendants who claim under legal mortgages or equitable charges have no ground for their claim to priority as purchasers without notice, for they had full notice from the will, and the mutual releases concerted between the three executors were instruments which, upon the face of them, ought to have raised suspicion, and put them upon inquiry. It has been held that where the estate is charged with the payment of debts

or

1836.

BRAITHWAITE v. BRITAIN.

or legacies, if from the circumstances of the transaction the sale or mortgage by an executor afford intrinsic evidence that the money was not to be applied for the debts or legacies, the purchaser or mortgagee will hold liable to the charge: *Watkins* v. *Cheek*. (*a*) Here it is not pretended that the mortgages were made for the purpose of paying debts or legacies, and the releases afforded intrinsic evidence of the contrary. In *Horn* v. *Horn* (*b*) it was held that, where legacies are charged upon the real estate of a trader, and the devisee and executor sell part of the real estate before the debts are paid, the purchaser is bound to see to the application of the purchase-money in payment of the legacies, the statute of the 47 *G.* 3. *c.* 74., making no difference in that respect.

Mr. *Barber*, Mr. *G. Richards*, and Mr. *Walker*, for the Defendants Sir *Charles Dalbiac*, and *Dalton*, and Messrs. *Swann* and Co.

The real estates of the testator are not charged generally with the payment of debts, nor are the *Sinderly* and *Kirklington* estates made liable beyond the amount of the sums respectively charged upon them. *Henvell* v. *Whitaker* (*c*) is distinguishable from the present case. There the testator directed all his debts to be paid by a certain executor thereinafter named, to whom all his real as well as personal estate was given; in this case there are separate and distinct devises to two of the executors, and to *George Britain*, the other executor, no real estate whatever is given. *Henvell* v. *Whitaker* lays down the rule applicable to similar cases in which the charge arises by implication. The next case, *Warren* v. *Davies* (*d*), which resembles the present case, establishes

(*a*) 2 *Sim. & Stu.* 199.
(*b*) 2 *Sim. & Stu.* 448.
(*c*) 3 *Russ.* 343.
(*d*) 2 *Mylne & Keen*, 49.

1836.

BRAITHWAITE v. BRITAIN.

blishes the exception to the rule which is applicable to cases where the charge by implication does not arise. Where, after a direction for payment of debts or legacies by executors after named, an estate is devised to one of two executors, as in *Warren* v. *Davies*, the implication of a charge upon the devised estates does not arise. In the present case there is an express charge to the amount of certain specified sums upon the *Sinderly* and *Kirklington* estates; but, beyond that amount, the principle of the decision in *Warren* v. *Davies* applies, and no charge can arise by implication. In *Thomas* v. *Britnell* (*a*), Lord *Hardwicke* held that a charge upon real estate for benefit of creditors might be raised in one part of a will and destroyed in another. *Douce* v. *Lady Torrington* (*b*) is not distinguishable from the present cases. There, as here, the testator began his will by directing all his debts to be paid, and by a codicil to his will he devised a particular estate upon trust, in the first place, to pay an annuity, and he directed the surplus only to be applied to the payment of his simple contract debts. Sir *John Leach* doubted in that particular case whether even the introductory clause, had it stood alone, would have raised any implication of an intention to create a new fund for the payment of debts, but he considered it unnecessary to decide that point, because the codicil made it clear that the testator did not intend a general charge upon his real estate. The same reason applies here, for the charge of particular sums for the payment of debts upon the *Sinderly* and *Kirklington* estates, negatives all possibility of the testator's intention to charge his real estates generally.

But even if it be admitted that there is a general charge or direction for the payment of debts followed by

(*a*) 2 *Ves.* sen. 314. (*b*) 2 *Mylne & Keen*, 600.

1836.

BRAITHWAITE v. BRITAIN.

by specific dispositions, it is settled that in that case a purchaser for a valuable consideration is not bound to see to the application of the purchase-money: *Barker* v. *The Duke of Devonshire* (*a*), *Jenkins* v. *Hiles*. (*b*) It is said that the mortgagee was bound to see to the due application of the sum of 3800*l*. charged upon the *Sinderly* estate; but where a charge is to be paid by an executor, and, from the length of time which has elapsed, it may be reasonably inferred that the charge has been satisfied, it is surely sufficient for a purchaser or mortgagee to see that there was a release of all claims from the executor to the persons entitled to the estate subject to the charge. Two years from the death of the testator elapsed before the division was made between the three executors, and after such a lapse of time the incumbrancer had no reasonable ground for supposing that the charge for the payment of debts had not been satisfied. Fraud is not imputed, and, after a reasonable time has elapsed, creditors who have slept upon their rights are not entitled to enforce them as against *bonâ fide* purchasers. *Horn* v. *Horn* (*c*), which was cited to shew that the mortgagees were bound to see to the application, applies to legacies, and not to debts; and *Watkins* v. *Cheek*, which was cited for the same purpose, was a case of fraud, and has no application to the present case.

The claim is barred by the statute of limitations; and it cannot be successfully maintained that payment of interest by the surviving partner took the case out of the statute. In *Atkins* v. *Tredgold* (*d*), where the survivor of two persons, who made a joint and promissory note, paid interest upon the note, it was held that

(*a*) 3 *Mer.* 310.
(*b*) 6 *Ves.* 654. n.
(*c*) 2 *Sim. & Stu.* 199.
(*d*) 2 *B. & Cress.* 23.

1836.

BRAITHWAITE v. BRITAIN.

that such payment of interest did not take the case out of the statute of limitations, so as to make the executors of the deceased party liable; and the authority of that case was recognized in the very recent case of *Slater* v. *Lawson* (*a*), where Lord *Tenterden* held that the same principle applied whether the payment were made by the survivor, or the representative of the deceased party, and that where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the other to take the debt out of the statute, as against the survivor. In *Putman* v. *Bates* (*b*), it was held that a creditor under the 49 *G.* 3. *c.* 74. could not claim payment out of real estate in the hands of a devisee, unless there had been an admission of the debt within six years. An admission of the debt by the executrix of a trader was held in that case not to be sufficient to take the debt out of the statute of limitations.

Mr. *Kindersley*, Mr. *Spence*, Mr. *Purvis*, Mr. *Wilbraham*, Mr. *Witham*, and Mr. *Torriano*, for other Defendants.

Mr. *Pemberton*, in reply, admitted that, upon the point of construction it was difficult to maintain that the testator's real estates were charged *ultrà* the sums specifically charged upon the *Sinderly* and *Kirklington* estates. It was not necessary, however, that the real estates should be charged either expressly or by implication, for the trust which the testator had created for the payment of his debts would, upon the authority of *Jones* v. *Scott*, affect his whole property both real and personal, and exclude the possibility of setting up the statute of limitations a sa defence. The right of the Plaintiff

(*a*) 1 *B. & Adol.* 396. (*b*) 3 *Russ.* 188.

1836.

BRAITHWAITE v. BRITAIN.

Plaintiff to claim against the estate of the deceased partner, was established by the case of *Devaynes* v. *Noble* (*a*), which had been decided by Sir *William Grant*, and affirmed upon appeal by Lord *Brougham*. That right was wholly independent of the solvency or insolvency of the surviving partner; and a joint creditor might, if he thought fit, resort in the first instance to the assets of the deceased partner: *Wilkinson* v. *Henderson*. (*b*)

The MASTER *of the* ROLLS.

Upon the death of *John Britain* the elder, the Plaintiff had a legal demand against the Defendants, *John Britain* and *William Thackwray*, as surviving partners, and besides that legal demand, she was in equity entitled to be paid out of the estate of *John Britain* the elder, the deceased partner. It is not denied that she is still so entitled, if the parties now interested in the estate should not have a valid defence arising from lapse of time, or other circumstances, which have occurred since the death of *John Britain* the elder.

Upon the construction of the will of *John Britain* the elder, I think that the direction to the executors to pay the debts did not affect more than the property which he had directed to come to the hands of the executors, and therefore did not amount to a charge on the devised estates beyond the amount of the respective sums of money which he had directed those estates respectively to be subject to; *Warren* v. *Davies*. (*c*) But under the statute 47 *G.* 3. *c.* 72. all his real estates, not charged by his will, were subject to the payment of his debts.

It

(*a*) 1 *Mer.* 529.
(*b*) 1 *Mylne & Keen*, 582.
(*c*) 2 *Mylne & Keen*, 49.

1836.

BRAITHWAITE v. BRITAIN.

It appears that the will was proved by *John* and *George* only, and not by *William Britain;* but, framed as this will is, I think that *William*, having accepted the benefits given to him, could not renounce the executorship in such a way as to exonerate himself from any liability to which he might be subjected as executor in this Court.

It does not appear that the Plaintiff had notice of the dissolution of the partnership by the death of the elder *Britain*, or, if she had, whether she ever applied to the executors, as such, for payment out of the estate of the deceased partner. But *John Britain*, one of the surviving partners, was an executor of the deceased partner, and I cannot assume him to have been ignorant of the rights or claims of the Plaintiff. However the fact may have been as to notice, the Plaintiff, having her legal demand against the surviving partners, as well as her equitable demand against the estate of the deceased partner, frequently applied at the banking-house for payment; and in the course of the years 1827, 1828, and 1829, she obtained some small sums on account.

It is obvious that the Plaintiff has a *primâ facie* case. The deceased *John Britain* was her debtor: she had against his estate a claim which has not been satisfied. Why should she not be paid now? In *Vulliamy* v. *Noble* (*a*), Sir *W. Grant* said, "It cannot be disputed that the deceased partner was subject to the liability, nor can it any more be made a question that a deceased partner's estate must remain liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they

(*a*) 3 *Mer.* 619.

they must be before his liability ceases." In *Wilkinson* v. *Henderson* (*a*), Sir *John Leach* considered, that "the estate of the (*b*) deceased partner is at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner." How then, in this case, is the estate of the testator relieved from the liability?

First, it is said, that the Plaintiff is precluded from relief by the statute of limitations. No demand, it is said, was made from *March* 1824, when the testator died, up to *April* 1833, when the bill was filed, a period of nine years. On this occasion it is not necessary to determine the effect of the statute in barring claims against the estate of a deceased partner, in cases not attended by the peculiar circumstances belonging to this case. But considering that in cases of this kind the creditor of a partnership has a right to avail himself, not only of the nature of the contract, but also of the equities subsisting between the parties; that the surviving partners may, as to past transactions (in respect to which they are subject to liability in common with the estate of the deceased partner), be not unreasonably considered as acting not only for themselves, but also on account of the estate of the deceased partner — that the demand was clearly kept up against the surviving partners — that one of the surviving partners was one of the executors of the deceased partner, acting as such, and also one of the legatees of the interest of the deceased partner in the concern, and that the testator had made charges on his real estate for the payment of his debts, I think that the case, considering all its circumstances,

(*a*) 1 *Mylne & Keen*, 582.

(*b*) In the report (p. 588. l. 12. from the bottom) "surviving" is by mistake printed for "deceased."

1836.

BRAITHWAITE v. BRITAIN.

stances, does not fall within the operation of the statute, and is not governed by the legal consideration on which the cases of *Atkins* v. *Tredgold* (*a*), and *Slater* v. *Lawson* (*b*), were decided.

It is next said that, by the will, no more than 3800*l.* was charged upon *Sinderly*, and no more than 1400*l.* upon *Kirklington*, for the payment of debts; and so far I concur; but it is further argued, that the estates were effectually discharged from those sums by the releases; that the mortgagees are not bound to see to the application of the money, and that they were purchasers for valuable consideration, without notice of the Plaintiff's claim.

If the two sums of 3800*l.* and 1400*l.* had been raised and paid to the executors, I think that the mortgagees would not have been bound to see to their application, and there might have been circumstances under which the declaration and release of the executors would have protected them; but they had notice of the will and of the trading; they knew that by the will the executors were bound to pay the debts; and that the sums of 3800*l.* and 1400*l.* were given, with the residuary property, to the executors, chargeable with the debts; and with this knowledge they take a title under the deed of the 20th of *April* 1826, by which it is so far from appearing that the money was paid to the executors that I think the contrary appears; for the sums of 3800*l.* and 1400*l.* are treated merely as legacies to the nephews, who are stated to have apportioned and divided the amount among themselves. The consequence, I think, is, that the releases only operate to the extent of the beneficial interest to which the executors, as

(*a*) 2 *B. & Cress.* 23. (*b*) 1 *B. & Adol.* 396.

1836.

BRAITHWAITE v. BRITAIN.

as legatees, were entitled in the charges; and that, for the benefit of creditors, the legatees continue to be affected with the charges against the mortgagees, who took under such a title.

As to any claim against the surplus of the *Sinderly* and *Kirklington* estates, after paying the charges, I think that the mortgagees must be considered as purchasers for valuable consideration without notice.

Refer it to the Master to take an account of what it is due to the Plaintiff in respect of the debt in the pleadings mentioned.

Declare, that for the benefit of the Plaintiff as a creditor of the testator, the *Sinderly* and *Kirklington* estates are to he considered as charged with the sums of 3800*l.* and 1400*l.*, or so much thereof as shall be required for full payment of what is due to the Plaintiff as aforesaid, and of the costs of this suit.

Take an account of the personal estate possessed by the executors, and let the same be applied in or towards satisfaction of what shall be found due to the Plaintiff on taking the account, and of the costs. If the same shall not be sufficient for that purpose, let the residue thereof be raised by sale or mortgage of the *Sinderly* and *Kirklington* estates, in shares proportioned to the amount of the sums charged on those estates respectively by the testator's will, and let all proper parties join in such sale or mortgage,

1836.

May 2. 6, 7.

BAKER *v.* SUTTON.

A bequest of the residue of personal estate for such religious and charitable institutions and purposes within the kingdom of *England*, as in the opinion of the testator's trustees should be deemed fit and proper, is a good charitable bequest.

A bequest of money, directed to be laid out on mortgage security, at the highest interest that could be legally and safely obtained for the same, held to be void under the mortmain act.

HENRY STOCKING, by his will, dated the 18th of *May* 1825, after directing his executors to place out at interest, during the life of *Frances Jarvis*, the sum of 1500*l.*, on such security as they should approve in the public funds, the dividends to be paid to the said *Frances Jarvis* during her life, and that after her decease, the said sum of 1500*l.* should sink into the residue of his personal estate, and be applied in like manner as such residue, and after giving some pecuniary legacies, gave and bequeathed to the Defendants, *Charles Sutton*, *Henry North*, *Samuel Stone*, and *Samuel Cross*, the sum of 6200*l.*, to be paid out of his personal estate within twelve calendar months next after his decease, free of legacy duty, in trust to place and continue the said sum of 6200*l.* at the highest interest they could legally and safely obtain for the same, on such mortgage security as they or the major part of them should approve of, and to receive the interest, dividends, and produce of the said sum of 6200*l.*, and to pay and apply the same to the persons, at the time and in the manner, and for the several intents and purposes, in favour of the poor of *Hunstanton* and parishes adjacent, and for the other purposes thereinafter particularly mentioned; that was, in the first place, by and out of the interest and produce aforesaid, to satisfy and pay all expenses, costs, and charges incurred in execution of the trust thereby in them reposed; and, in the next place, to pay, whenever it should be necessary, the expenses of repairing, resetting, and renewing the tombs directed in that his will to be erected to the memory of his parents and himself, and the north slab or tablet which he

1836.

BAKER v. SUTTON.

he had directed to be fixed in the church of *Hunstanton*, with an inscription to perpetuate the remembrance of the bequests made in his will; and also, in the week before *Christmas*, yearly, to pay or cause to be paid to the minister, churchwarden, and overseers of the said parish of *Hunstanton*, the sum of 10*l.* [The testator proceeded to make similar bequests to the minister, churchwardens, and overseers of several other parishes, and to direct that the whole of such bequests should be distributed for the benefit of the poor of the different parishes, at the discretion of such minister, churchwardens, and overseers respectively.] The remainder of the produce of the said premises he directed the trustees for the time being to account for and pay annually, in the week preceding *Christmas*, unto the minister, churchwardens, and overseers of the parish of *Hunstanton*, to be by them, or the major part of them, applied in manner following; that is to say, to the minister of *Hunstanton* the sum of 20*s.* yearly, on *Christmas-day*, provided he should read such part of the testator's will as related to his bequests to the poor, and preach a sermon on the occasion, at which sermon the testator declared he expected the objects of his charity would attend, and that such as should not, without sufficient excuse, should forfeit such part of his bounty as to the said minister, churchwardens and overseers, or the major part of them, should seem meet and proper; and to the parish clerk of the parish of *Hunstanton*, on *Christmas-day* yearly, the sum of 3*s.*, for overseeing and cleaning the said tombs and tablets, and giving information when the same or any of them were out of repair. And to the minister of the parish of *Holme* for the time being the sum of 20*s.* for attending to the said tombs and tablets, and preaching a sermon yearly in the parish church of *Hunstanton*, with the assent of the minister thereof;

1836.

BAKER v. SUTTON.

and he directed that the sum of 70*l.* should be yearly set apart, appropriated, and applied by the minister, churchwardens, and overseers of *Hunstanton*, for the purpose of assisting in clothing the poor belonging to the parish of *Hunstanton*, at the times and in the manner therein particularly directed.

And the testator further directed, that the sum of 15*l.*, other part of his said money, should be yearly set apart and paid to an aged, discreet, and religious woman, to be chosen by the minister of *Hunstanton* for the time being, able and desirous of teaching fifteen female children of the poorest families of the said parish in reading, writing, knitting, and sewing, from the age of seven years until the age of thirteen years, such children to be selected and instructed in the manner therein mentioned. And the remainder of the sum so to be annually received by the minister, churchwardens, and overseers of *Hunstanton*, after all the before-mentioned payments should have been provided for, the testator directed to be applied for the benefit of six of the most poor and aged men belonging to the said parish in the manner therein mentioned. And as to all the rest, residue, and remainder of his goods, chattels, monies, securities for monies, whether in the public funds or otherwise, and all other his personal estate whatsoever and wheresover, he gave and bequeathed the same to his executors in trust for such sundry religious and charitable institutions or other purposes as he might thereafter specify in any codicil or codicils to that his will. And in failure so to do, in trust that they, and the survivors and the executors, and administrators of such survivors, should pay and dispose of the same for such religious and charitable institutions and purposes within the kingdom of *England* as in the opinion of the major part of them should be deemed fit and proper.

The

1836.

BAKER v. SUTTON.

The testator made a codicil to his will, dated the 6th of *June* 1825, whereby, after giving a legacy of 100*l.* to the Defendant, *Joseph John Gurney*, he gave to the said Defendant the sum of 8000*l.* to be invested in government or real securities for the benefit of *Emily Stocking Jarvis*, the daughter of the said *Frances Jarvis*, and her children, who should attain the age of twenty-one; but if the said *Emily Stocking Jarvis* should die without leaving any children, or, being such, they should die under the age of twenty-one, the said testator directed that the whole of the said principal money, with the accumulations, dividends, and interests thereof then unapplied, should sink into and be applied in the same manner as before directed with respect to the residue of his personal estate.

The bill was filed by the next of kin against the trustees and the Attorney-General; and the questions in the cause were, first, whether the bequest of the residue was sufficiently definite to take effect as a good charitable bequest; and, secondly, whether the legacy of 6200*l.* was or was not void by the mortmain act.

Mr. *Kindersley* and Mr. *Blunt*, for the next of kin.

The first question is, whether the gift of the residue is such a bequest as according to the authorities, and especially according to the late case of *Williams* v. *Kershaw* (*a*), can take effect as a good charitable gift. In *Williams* v. *Kershaw* the testator gave the surplus and ultimate residue of his personal estate to trustees upon trust to invest the same in the public funds or on real securities, and to apply the dividends, interest, and annual produce to and for such benevolent, charitable, and

(*a*) *July* 1835, before the present Lord Chancellor, when Master of the Rolls.

1836.

BAKER v. SUTTON.

and religious purposes as they, in their discretion, should think most advantageous and beneficial, and to or for no other purpose whatsoever; and the Court held that this was too indefinite a trust to be capable of being carried into execution by this Court. In *Morice* v. *The Bishop of Durham* (*a*), where the words were "to such objects of benevolence and liberality as the Bishop of *Durham* in his own discretion should most approve of," Sir *William Grant* held that the trust was too indefinite to be executed by this Court as a charitable trust, and that the residue was consequently undisposed of; and that decision was affirmed upon appeal by Lord *Eldon*. (*b*) In *Vezey* v. *Jamson* (*c*), where the residue was given to the testator's executors upon trust to dispose of it, at their pleasure, either for charitable or public purposes, the next of kin were held to be entitled, upon the ground that the trust was too vaguely and indefinitely expressed to take effect as a charitable gift. In *Waldo* v. *Caley* (*d*), where the testator directed his widow, with the advice and assistance of his trustees, to apply a part of his property to the promotion of charitable purposes as well of a public as a private nature, specifying some particular purposes, Sir *William Grant* held that the discretion, as to the disposition of the fund, was in the widow, and not in the trustees, though it was to be exercised with their advice and assistance; and he declined directing a scheme. In *Ommaney* v. *Butcher* (*e*) the testator directed his "remaining money" to be given in private charity; and Lord *Eldon* held that private charity was an object too indefinite to enable the Court to carry the trust into execution. *Horde* v. *The Earl of Suffolk* (*g*) may seem somewhat inconsistent with this decision; for there the testatrix

(*a*) 9 *Ves.* 399.
(*b*) 10 *Ves.* 522.
(*c*) 1 *Sim. & Stu.* 69.
(*d*) 16 *Ves.* 206.
(*e*) *Turn. & Russ.* 260.
(*g*) 2 *Mylne & Keen*, 59.

1836.

BAKER v. SUTTON.

testatrix bequeathed sums to be distributed annually in charities, at the discretion of the trustees, either to private individuals or public institutions; and the Court declared, as in *Waldo* v. *Caley*, that the legacies did not fail, but that a scheme was unnecessary. It is to be observed that in *Horde* v. *The Earl of Suffolk* Sir *John Leach* makes no allusion to the case of *Ommaney* v. *Butcher:* he founds his decree entirely upon the resemblance of the bequest in the case before the Court to that in *Waldo* v. *Caley;* and there is no reason to suppose that he intended to question the authority of *Ommaney* v. *Butcher*. As to the gift of 6200*l.* directed to be invested in mortgage security, there can be no doubt that the testator intended that sum to be invested in real security; and the gift is consequently void under the mortmain act.

Mr. *Chandless* and Mr. *Roupell*, *contrà*.

This case is distinguishable from *Morice* v. *The Bishop of Durham*, and the late case of *Williams* v. *Kershaw*, for in those cases the Court went very much upon the effect of the words "liberal" and "benevolent." Benevolence is sufficiently distinguishable from charity, at least from charity in that sense in which it is understood in courts of equity; but charity is of the very essence of religion, and it would be difficult to point out any charitable purpose which would be inconsistent with religion, or any religious purpose which would conflict with charity.

Lord *Bathurst* held a gift to charitable and pious uses to be a good charitable bequest, and the word "pious" is synonymous with religious; *Attorney-General* v. *Herrick*. (*a*) Supposing, however, that religious purposes

(*a*) *Ambl.* 712.

1836.

BAKER v. SUTTON.

poses are to be considered as distinct from charitable purposes, then the word "and" must be taken disjunctively, and will be equivalent to "or;" and if equivalent to "or," it has been held that where an option is given between two modes of proceeding, one of which only will give effect to a charitable gift, the Court will adopt that which will effectuate the charitable intention of the testator. Thus, in *The Attorney-General* v. *Hill* (*a*), the Lord Chancellor says that, if in that case it had been the intention of the testator to give the trustees power to lay out the residue of his personal estate in the purchase of lands *either* in *Scotland* or *England*, the gift to charity would be good.

The last-mentioned principle applies, also, to the gift of the 6200*l.*, which the testator has directed his trustees to invest on mortgage security at the highest interest they can legally and safely obtain for the same. The word mortgage does not necessarily, or *ex vi termini*, mean a pledge of real estate. The first definition of a mortgage in *Comyns's Digest* is "*quasi mortuum vadium*, when a thing moveable or immoveable, as goods or land are pledged as a security for repayment of money." If goods, therefore, may be pledged, and the charitable purpose of the testator thereby effectuated, why is it to be assumed that land was intended to be pledged, when a mortgage of land will defeat the charitable intention of the testator? Besides, the testator was possessed of *Hibernian* and *Anglo-Mexican* mining shares, and the testator might well have contemplated an investment in foreign real securities, which are not within the statute of mortmain, especially as he has directed that the mortgage security should be at the highest interest that could be legally and safely obtained for

(*a*) 3 *Russ.* 338.

for the same. In *Grimmett* v. *Grimmett* (*a*), the Court went a great length in support of the principle here contended for. In that case Lord *Hardwicke* held, that a devise to a charity of money, directed to be invested in the public funds till the whole could be laid out in the purchase of lands to the satisfaction of the trustees, was not within the statute of mortmain; the ground of his decision being the possibility that the law might be altered, and that, while it remained unaltered, the trustees could not be supposed to approve of laying the money out in land; and also the possibility of the trust devolving upon the Court, if the trustees should decline to act, in which case the Court would order the money to be placed in the funds, and not to be invested in lands.

Mr. *Kindersley*, in reply.

The question is not, as the case has been argued on the other side, whether charity in the scriptural sense — the ἀγάπη of *St. Paul* — is of the essence of religion, which is undeniable; but whether religious purposes are necessarily charitable purposes in the sense wherein charitable purposes are understood, and can be carried into effect in this Court. In that sense, which is to be gathered chiefly from the enumeration of charitable purposes in the statute of *Elizabeth* (*b*), and what may be deemed by analogy to be within the intendment of the statute, many religious purposes are not necessarily charitable, though they may be, and undoubtedly are so, in a purer and more enlarged sense of the word. A gift of stock to be applied for ever in the purchase of such books as, by a proper disposition of them, might have a tendency to promote the interests of virtue and religion, and the happiness

(*a*) *Ambl.* 210. (*b*) Stat. 43 *Eliz. c.* 4.

1836.

BAKER v. SUTTON.

happiness of mankind, exemplary as that purpose was, was held not to raise a charitable trust. *Browne* v. *Yeale*. (*a*) The words "mortgage security" were clearly used by the testator in their ordinary sense, and the trustees would not have been justified in investing the money in lands out of the country.

May 6.

The MASTER *of the* ROLLS.

In this case the bequest is for such religious and charitable institutions and purposes as the major part of the trustees shall think proper; and the question is, whether this is to be considered as a gift for charitable purposes. In *Williams* v. *Kershaw*, the gift was for such benevolent, religious, and charitable purposes as the trustees should in their discretion think most beneficial; and the Master of the Rolls, considering that these words were to be taken, not conjointly, but in a distributive sense, was of opinion that they were too vague to raise a charitable trust which this Court could carry into execution.* I have looked carefully into all the cases, and I do not find any one of them precisely in point with the present. In *Morice* v. *The Bishop of Durham* (*b*), where the bequest was for objects of benevolence

(*a*) Cited in a note to *Moggridge* v. *Thackwall*, 7 *Ves.* 50.

(*b*) 9 *Ves.* 399.

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* The words of Lord *Cottenham* as to this point were as follows: — "Did he (the testator) mean that there should be no application of any fund to any but religious purposes? Such is not the natural meaning of the words, or the apparent intention of the testator. He intended to restrain the discretion of his trustees only within the limits of what was benevolent, or charitable, or religious." — "The option in the present case makes the gift bad, not because illegal, but because it introduces a generality which deprives it of its character of a charity legacy, and makes it impossible for this Court to execute it."

1836.

BAKER v. SUTTON.

benevolence and liberality, much stress was laid upon the word "liberality," as a word not only not necessarily importing charity, but often conveying notions inconsistent with any purposes of charity, and at any rate open to such latitude of construction as to raise no trust which a Court of equity could carry into execution. All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose. In the *Attorney-General* v. *Stepney* (*a*), the testator gave the residue of his personal estate for the use of the *Welsh* circulating charity schools, as long as they should continue, and for the increase and improvement of Christian knowledge, and promoting religion, and to purchase bibles and other religious books, Lord *Eldon* assumes, throughout his judgment, that a religious purpose was a charitable purpose. He adverts to the case of Mr. *Bradley*'s will, *Browne* v. *Yeale* (*b*), where the testator directed such books to be purchased and circulated as might have a tendency to promote the interests of virtue and religion, and the happiness of mankind, and he sufficiently manifests his dissent from Lord *Thurlow*'s decision in that case in favour of the next of kin, by intimating that he should not follow it unless the very words were again to be decided upon.

I am of opinion that the bequest, in the present case, for such religious and charitable institutions and purposes as the trustees should think fit, is a good charitable gift.

As to the other point, I think I am not at liberty to adopt the refinements suggested at the bar, but that I must look to what the testator really and substantially meant. I cannot suppose that the testator meant the mortgage of a ship, or of any personal chattel, or that the testator

(*a*) 10 *Ves.* 22. (*b*) 7 *Ves.* 50. n.

1836.

BAKER v. SUTTON.

tor contemplated the investment of the money in *Ireland* or *Scotland*, or in any foreign country. The impression upon my mind is that the testator intended an investment in real security; but I will consider that point before I finally decide it.

May 7. On the following day his Lordship intimated his adherence to that opinion.

Declare, that the bequest of 6200*l.* is void by the statute of mortmain. Declare, that the bequest of the residue of the testator's estate for charitable purposes is void under the statute of mortmain, so far as such residue consists of any interest in land or money payable out of or secured on land. Declare, that the *Hibernian* mining shares and *Anglo-Mexican* mining shares in the report mentioned, are not such an interest in lands as that the bequest thereof for charitable purposes is within the operation of the Statute of Mortmain. Declare, that the funeral and testamentary expenses, debts, and legacies (except the 6200*l.* legacy), and the costs of all parties of this suit, as between solicitor and client, ought to be paid *pro ratâ* out of the mixed personalty and pure personally; and refer it to the Master to apportion the same accordingly. Declare, that the Plaintiffs entitled as next of kin to so much of the mixed personalty as shall remain after paying its proportion of such funeral and testamentary expenses, debts, legacies, and costs. Let the costs of all parties be taxed and paid as between solicitor and client. Let the trustees submit a scheme to the Master for an application of so much of the pure personalty as shall remain after paying its proportion of such funeral and testamentary expenses, debts, legacies, and costs. And let the costs of and incident to such scheme be paid exclusively out of the pure personalty.

1836.

MANN *v.* BURLINGHAM.

July 7.

A direction to executors to purchase so much freehold land as could be bought for 100*l.* for a charitable purpose; and in case land could not be conveniently purchased within twelve months after the testator's decease, to pay 20*s.* per quarter for such charitable purpose, until such purchase could be made, does not give the executors such a discretion as to take the bequest out of the mortmain act.

THE will of *John Mann* contained the following bequest: — "I will and desire my executors to purchase so much freehold lands as can be bought for 100*l.*, after reserving so much of that 100*l.* as shall be sufficient to pay for the conveyance of the land, and other expenses that the law of the case may require. And I will that the land so purchased be safely conveyed to trustees, such as are appointed from time to time to manage the estate long since given for the support of the particular Baptist interest at *Great Ellingham*, of which interest *Charles Hatsker* is now pastor. And my will is, that the land so purchased be so conveyed as the profits arising therefrom be enjoyed and received hereafter by the minister or pastor of the aforesaid particular Baptist church at *Great Ellingham* for ever, so as to be consolidated with the old estate. And in case land cannot be conveniently purchased within twelve months after my decease, my will is that 20*s.* per quarter be paid to the minister of such Baptist church as shall be the resident preacher from time to time until such purchase can be made. And I hereby authorize my executors to raise the said 100*l.* so given as aforesaid out of my real estate or personal estate."

The question was, whether this bequest was within the mortmain act.

Mr. *Wray*, for the *Attorney-General*, submitted that the executors, under this bequest, had such a discretion as enabled them to abstain from laying the money out in land, and consequently to support the charitable intention

1836.

MANN v. BURLINGHAM.

intention of the testator. In *Grimmett* v. *Grimmett* (*a*), the testator directed a fund to stand in the name of trustees until the whole could be laid out in the purchase of lands for a charitable purpose to their satisfaction; and Lord *Hardwicke* supported the charitable gift, and held that, so long as the statute remained in force, the trustees could never approve of so laying it out, and it would be a breach of trust if they did. In this case, the executors had a discretion to give effect to the testator's intention in a lawful manner, if land could not be conveniently purchased within twelve months after his decease; and as land never could be conveniently purchased, as long as the mortmain act remained in force, the executors had a continuing discretion. Whenever an alternative was presented of executing a charitable purpose in a lawful and in an unlawful manner, the Court would effectuate the charitable intention.

Mr. *Kindersley*, *contrà*, contended, that in this case the testator had given no such alternative to his executors; he had merely substituted a mode of effecting his charitable purpose for a limited time, if it should not be convenient to purchase land immediately after his decease, and when that limited time had expired, the executors were expressly required to purchase land. In *Grieves* v. *Case* (*b*), where the testatrix gave to trustees a sum of money for a charitable purpose, to be laid out in the purchase of land, and to be placed out at interest till a purchase could be made, the Court held, that the gift was void, because land was ultimately the thing intended to be given. In construing charitable bequests, the Court would not act upon ingenious refinements, or exercise its astuteness for the purpose of giving effect to such gifts, but would in these as in all other

(*a*) *Ambl.* 210. (*b*) 4 *Bro.* 67.

1836.

MANN v. BURLINGHAM.

other cases, look to the plain expressions used by the testator for the purpose of determining whether those expressions were or were not consistent with law. This was the principle upon which the Court proceeded in the late case of *Baker* v. *Sutton* (*a*) in deciding that a direction to invest upon mortgage security could only be taken to apply to an investment on a mortgage of land.

The MASTER *of the* ROLLS.

If I were called upon to decide upon the very words used by the testator in the case of *Grimmett* v. *Grimmett*, I should follow the decision of Lord *Hardwicke* in that case. But the present case is distinguishable from *Grimmett* v. *Grimmett*, leaving no such discretion to the trustees as that which Lord *Hardwicke* made the foundation of his judgment. The words here are, "In case land cannot be conveniently purchased within twelve months after my decease, my will is that 20*s.* per quarter be paid to the minister of such Baptist church, until such purchase can be made." There can be no doubt that the testator intended the trustees at all events to invest the money in land; and I am of opinion, therefore, that this legacy cannot stand.

(*a*) *suprà*, p. 224.

1836.

July 7.

BELK *v.* SLACK.

Bequest of residue to *A.* for life, and after the death of *A.* and *B.* to *G. B.* and *H. B.* to be equally divided between them, share and share alike, or to the survivor or survivors of them.

G. B. and *H. B.* both died in the lifetime of the surviving tenant for life: Held, that their representatives were respectively entitled to a moiety of the residue on the death of the surviving tenant for life.

WILLIAM BELK, by his will, dated the 16th of *November* 1799, gave the residue of his real and personal estate to trustees upon trust to pay the interest and produce thereof to his mother during her life, and after the decease of his mother and daughter he devised and bequeathed the same to his brother, *George Belk*, and his sister, *Hannah Belk*, to be equally divided between them, share and share alike, or to the survivor or survivors of them.

The testator died shortly after the date of his will, leaving his mother, his daughter *Sarah Slack*, his brother *George Belk*, and his sister *Hannah Belk*, surviving him. It appeared by the Master's report that *George Belk* died in 1820, and that *Hannah Belk* survived the testator, but had not been heard of for upwards of thirty years. *Sarah Slack*, the testator's daughter, and sole next of kin, survived the testator's mother, and died in 1821.

The bill was filed by the personal representative of *George Belk* against the personal representative of *Sarah Slack*, and the question in the cause was, whether the Plaintiff was entitled to a moiety of the residue of the testator's personal estate (there being no real estate), or whether, in the events which happened, the residue was undisposed of at the death of the surviving tenant for life, and went to the testator's next of kin.

Mr. *Pemberton* and Mr. *Parker*, for the Plaintiff, said, that the gift to the testator's brother and sister in words importing

1836.

BELK v. SLACK.

importing a tenancy in common, could not be affected by the words, "or to the survivor or survivors of them;" for the word "survivors" could not be referred to two persons, and must be rejected as insensible. Words of survivorship, combined with words importing a tenancy in common, if capable of any construction, must be referred to the death of the testator. *George Belk*, therefore, took a vested interest in a moiety of the residue as tenant in common with his sister: *Brown* v. *Bigg* (*a*); *Shergold* v. *Boone*. (*b*) In *Sturgess* v. *Pearson* (*c*) there were, as in the present case, after a tenancy for life, words importing a tenancy in common, and words importing survivorship, the testator having given a fund to his daughter for life, and after her death to be equally divided among her three children, or such of them as should be living at her death. All the children died in the lifetime of the tenant for life; and it was held that they took vested interests transmissible to their representatives.

Mr. *Kindersley, contrà.*

The words, "survivor or survivors of them" are properly referrable to the death of the tenants for life. It is now settled that, where a legacy is given to several persons, equally to be divided between them, or to the survivors or survivor of them, and a previous life estate be given, the period of division, to which the survivorship must be referred, is the death of the tenant for life; *Cripps* v. *Wolcott*. (*d*) Here, the legatees having died in the lifetime of the tenant for life, the period of division never arrived, and the legacy, at the death of the surviving tenant for life, was undisposed of, and belonged to the next of kin.

Mr.

(*a*) 7 *Ves.* 279.
(*b*) 13 *Ves.* 370.
(*c*) 4 *Mad.* 411.
(*d*) 4 *Mad.* 11.

1836.

BELK v. SLACK.

Mr. *Pemberton*, in reply.

Cripps v. *Wolcott* is inconsistent with the previous authorities; and there is nothing in this will from which it can be reasonably inferred that the testator intended his bounty to his brother and sister to depend upon the contingency of their surviving the tenant for life.

The MASTER *of the* ROLLS held, that *Hannah Belk* must be presumed to have died in the lifetime of the surviving tenant for life; and that the Plaintiff, and the representative of *Hannah Belk*, were respectively entitled, at the death of the surviving tenant for life, to a moiety of the residue.

July 9.

HUTCHINSON *v.* STEPHENS.

HUTCHINSON *v.* GREEN.

The testator gave all his lands, tenements, and hereditaments, and the residue of his personal estate, to trustees, &c. to the use of his grandson *H. T.* for life, and after his decease in trust for the child and children of *H. T.*, at his or their ages of twenty-one, as tenants in common; but in case *H. T.* should happen to die without leaving any lawful issue of his body living at the time of his decease, then over.

H. T. had two children, a son, who died in his infancy, and a daughter who attained twenty-one, but died intestate in the lifetime of *H. T.*, leaving children: Held, that in the events which happened, the personal estate belonged to the personal representative of the daughter of *H. T.*, and that the real estate vested in her heir-at-law.

HENRY WILKINSON, by his will dated the 15th of *January* 1791, devised and bequeathed his real estate, and the residue of his personal estate, in the following words: — "I do hereby give, devise, and bequeath all and every my freehold houses, lands, tenements, and hereditaments whatsoever and wheresoever, in possession, reversion, remainder, or expectancy, and also all the rest, residue, and remainder of my personal estate whatsoever not hereinbefore disposed of, after payment

1836.

HUTCHINSON v. STEPHENS.

payment of my debts, legacies, and funeral expenses, and the charges of proving this my will, unto the said *William Stephens*, *Thomas White*, and *W. Marriott*, their heirs, executors, administrators, and assigns for ever, (according to the several and distinct estates, rights, and interests which I have and they can take therein,) in trust for and to the use of my grandson *Henry Tripp*, for and during the term of his natural life; and from and after his decease, in trust for the child and children of the said *Henry Tripp* lawfully to be begotten, if more than one at his, her, and their respective ages of twenty-one years, in equal shares and proportions, to take as tenants in common and not as joint tenants; and if there shall be but one child of the said *Henry Tripp* living at the time of his decease, then in trust for such only child at his or her said age of twenty-one years. But in case my said grandson *Henry Tripp* shall happen to depart this life without leaving any lawful issue of his body living at the time of his decease, then and in such case I do hereby give, devise, and bequeath all and every my said freehold estates, and the said *residuum* of my personal estates," over to the persons therein mentioned.

The testator died in *November* 1791, leaving his grandson *Henry Tripp*, named in the will, his heir-at-law and sole next of kin. *Henry Tripp* had issue a son who died an infant in his lifetime, and a daughter, *Christian Mary*, who intermarried with the Plaintiff *Hutchinson*, and had several children, parties to the cause.

Christian Mary Hutchinson died in *May* 1828, in the lifetime of her father *Henry Tripp*, who died in the year 1831, and by his will bequeathed all his property among the children of his daughter *Christian Mary Hutchinson*. The Plaintiff *Hutchinson* having taken out administration to the estate of his wife, filed the original bill against the

1836.

HUTCHINSON v. STEPHENS.

trustees and persons interested under the will, claiming the personal estate. He subsequently became a bankrupt, and a supplemental bill was filed by the parties claiming interests under the will against his assignees.

Mr. *Pemberton* and Mr. *Rogers*, for the Plaintiff in the original suit.

The Plaintiff in the original suit claimed, under the will of the testator in the cause, as administrator of his wife, the whole of the testator's personal estate; and as executor and trustee under the will of *Henry Tripp*, he has, notwithstanding his bankruptcy, a sufficient interest to maintain the suit. The testator created a mixed fund, and gave the residue to his grandson, *Henry Tripp*, for life, and, after his decease, in trust for the child and children of his grandson, at his and their respective ages of twenty-one years in equal shares; and if but one child of *Henry Tripp* living at the time of his decease, in trust for that only child. The testator had only one child who attained twenty-one, *Christian Mary;* and that child, who afterwards married the Plaintiff, took a vested interest, on attaining twenty-one, in the personal estate. There is a gift over, "in case *Henry Tripp* shall happen to depart this life without leaving any lawful issue of his body at the time of his decease:" but *Henry Tripp* did leave lawful issue of his body, namely, the children of the daughter under whom the Plaintiff claims. The limitation over, therefore, cannot take effect, unless the words "any issue" are to be read "such issue," or "children," in opposition to their natural meaning, and also to the plain intention of the testator; for he could never intend any collateral relations to take, while he had any descendants living. The Court will always struggle in favour of a construction which supports the natural preference which a testator must be presumed to give to his descendants. Thus

Thus in *Sturgess* v. *Pearson* (*a*), where the testator gave the interest of a fund to his daughter, and after her decease, the principal to be equally divided amongst her three children, or such of them as should be living at her death, the Court considered the words "such of them, &c." to mean some or one; and as none of them, in the event which happened, were living at the mother's death, held that the testator's grandchildren took vested interests transmissible to their representatives. The Plaintiff has no interest in the real estate.

Mr. *Tinney* and Mr. *Longley*, for the children of *Christian Mary Hutchinson*.

After the legal estate given to *Henry Tripp* for life (for the trustees are mere feoffees to uses), the testator gives his lands, tenements, and hereditaments, to the child or children of *Henry Tripp* at his or their respective ages of twenty-one, which, though there are no words of limitation, and though the words "lands, tenements, and hereditaments" are insufficient (*Denn* v. *Mellor* (*b*)) without such words to carry the fee, passed the fee, as we contend, in the present case, to the children of *Henry Tripp*, and, in the event which happened, to his daughter. It is to be observed that, in the clause containing the gift over, the testator devises all his "estates," a word which, had it been used in the direct devise to *Henry Tripp*'s children, would have been sufficient to pass the fee, and which may be taken as an index of his intention in the clause where it is not used. A gift to *A.* at twenty-one, or when *A.* shall attain twenty-one, does not suspend the vesting of real estate, but only marks the period at which the devise is to vest in possession: *Boraston's case* (*c*); *Doe dem. Hunt* v. *Moore*. (*d*) As to the

(*a*) 4 *Mad.* 411.
(*b*) 5 *T. R.* 558.
(*c*) 3 *Co.* 19.
(*d*) 14 *East*, 601.

1836.

HUTCHINSON v. STEPHENS.

the absence of words of limitation, there is no rule of law which prevents the Court from giving a fee where no words of limitation are used, if the intention of the testator to give an absolute interest can be collected from other parts of the will: *Doe dem. Wight* v. *Cundall.* (*a*) The testator has created a mixed fund, and as it was evidently his intention to give the children of *Henry Tripp* an absolute interest in the personal estate, and the rule of law co-operates with that intention, so the rule which applies to the personal estate, regard being had to the intention of the testator, will govern the construction to be put upon the gift of the real estate. There is no direct gift to the grandchildren, because the testator clearly contemplated that they would take a derivative interest under the gift to their parents; and that derivative interest can only be given by enlarging the estate of the parents to a fee-simple. An indefinite estate to *A.*, and if *A.* do not attain twenty-one, to *B.*, gives the fee to *A.* by implication, if he attain twenty-one. That the testator intended to make an effectual provision for the grandchildren of *Henry Tripp* is manifest from the limitation over, in case *Henry Tripp* should die without leaving issue; and that provision is effectuated by giving the children a fee. *Robinson* v. *Grey* (*b*) is a case in point with the present. There, the devise, after express estates for life to the testator's three daughters, was in trust for all and every the child and children of those daughters who should be living at the death of the survivor of them, to take as tenants in common; but if all the daughters should die without leaving any issue, after the decease of the survivor in trust for her grandson, *William Robinson*, in fee, who was the heir-at-law of the testatrix, with a residuary devise of her real and personal estate to the three daughters; and the Court held,

(*a*) 9 *East*, 400. (*b*) 9 *East*, 1.

1836.

HUTCHINSON v. STEPHENS.

held, that such of the children of the three daughters as should be living at the death of the survivor of them would take estates in fee as tenants in common. Some stress was laid in the argument upon the circumstance of *William Robinson* being the heir at law; and it was said, that the testatrix must have meant the children of the daughters to take the fee, because, if they took estates for life only, the devise to the grandson on the death of the daughters without leaving issue would have been nugatory, because he would have taken as heir at law. There is no weight, however, in that argument, and there is no reason to suppose that it influenced the certificate, because, if there were no children to take, the daughters would have been entitled to the reversion under the residuary clause, and the heir would not have taken by descent. The Court, therefore, probably went upon the ground, that the indefinite devise to the children of the daughters, and the devise over in case of a particular event, which did not happen, gave the fee to the children.

Mr. *Preston*, for the executor and trustee under the will of *Henry Tripp*.

In this case there is, in the events which have happened, an intestacy both as to the personal and the real estate. The double contingency upon which the gift to the children of *Henry Tripp* was to take effect was their attaining the age of twenty-one years, and their surviving their father. The daughter attained the age of twenty-one years, but she died in the lifetime of her father; consequently the contingency never happened, and she never acquired a vested interest either in the personal or the real estate. The limitation over could not take effect, because, although *Henry Tripp* left no children, he left grandchildren, who answered the description of lawful issue, though no devise was made to them. He became entitled,

1836.

HUTCHINSON v. STEPHENS.

therefore, in the events which happened, both to the real and personal estate of the testator as heir-at-law and next of kin. Even supposing the daughter of *Henry Tripp* to have taken a vested interest in the personal estate, it does not follow that, because the testator has created a mixed fund, and disposes of his real and personal estate in the same clause, the devise of the real estate is not contingent because the bequest of the personalty is vested, or that the devise to the children without words of limitation passes the fee because the gift of the personal estate requires no such words. If a man give a farm and a horse to *A.* without more, *A.* does not take the fee-simple of the farm because he is absolutely entitled to the horse. If *Henry Tripp* had had ten children, and nine of them had died in the lifetime of their parent, having attained twenty-one, and leaving issue, and the remaining child had survived its parent and attained twenty-one, that child would, upon the construction of this will, have been entitled, to the exclusion of all the other children and their issue. This is the true test by which the contingency of the gift is to be tried; and as the contingency has not happened, and the limitation over is incapable of taking effect, both the real and personal estate of the testator are undisposed of.

Mr. *Pemberton* replied as to the personal, and Mr. *Tinney* as to the real estate.

The MASTER *of the* ROLLS held that, in the events which happened, the personal estate belonged to the personal representative of the daughter of *Henry Tripp*, and that the real estate vested in her heir at law. The intention of the testator appeared to be, to make a provision by way of settlement for the family of *Henry Tripp*; and that construction would effectuate his intention.

1836.

BOOTH *v.* LEYCESTER.

PALMER *v.* LEYCESTER.

Feb. 24. 26. 29.
March 5. 7.
April 16.

THE first suit was instituted by the Plaintiff *Booth*, who was the assignee of several annuities granted by the late Sir *John Roger Palmer*, and the object of it was to have the arrears of those annuities, together with interest, paid to him out of the estates alleged to be subject to them. The Plaintiff in the second cause, Sir *William Henry Palmer*, stating himself to be the heir-at-law and next of kin of Sir *John Roger Palmer*, disputed the validity of the annuities, and prayed that the estates and property, alleged to be subject thereto, might be conveyed and assigned to him by the trustee in whom they were vested.

A Plaintiff cannot, as of course, obtain an order, to dismiss his bill upon payment of costs, where such dismissal may prejudice the Defendant; and where a Plaintiff in a cross suit obtained an order, as of course, to dismiss his bill, after the original bill and the cross bill had been set down to be heard together, the order was held to be irregular.

The Court will not give interest upon the arrears of an annuity, unless a special case be made.

The property in question originally belonged to *Thomas Hanway*, who, by his will dated the 2d of *January* 1772, gave 4000*l.*, part of a sum of 10,000*l.* mortgage money therein mentioned, to his nephew, *Thomas Altham*, for life, with remainder to his widow, if he left one, with remainder to his children; and he gave his *Middlesex* estate to trustees, in trust as to one half for *Thomas Altham* for life, with remainder to his children in tail.

In *October* 1772 the testator died. His nephew, *Thomas Altham*, died in the year 1782, and had two children, a son, *Thomas William Altham*, who attained the age of twenty-one years in the year 1778, and a daughter, *Mary Altham*, who attained the age of twenty-one in the year 1790. Each of them was entitled to

1836.
BOOTH
v.
LEYCESTER.

2000*l.*, part of the above-mentioned mortgage-money, and each to one fourth part of the *Middlesex* estate in tail. *Mary Altham* was moreover entitled to 3314*l.* consolidated bank annuities, and 1000*l.* reduced three per cent annuities.

In the year 1791 a marriage took place between *Mary Altham* and Sir *John Roger Palmer*, the brother of Sir *William Henry Palmer*, the party to these causes.

Sir *John Roger Palmer* was entitled to certain *Irish* estates under the will and settlement of *Thomas Palmer*, and also entitled to some interest in certain estates devised to him by the will of his father Sir *Roger Palmer*.

In the articles for a settlement which preceded the marriage, it was recited, that it was conceived that Sir *John Roger Palmer*, under the will of his father Sir *Roger Palmer*, was seised for life with remainders over of estates in *Ireland*, subject to the payment of the debts and legacies of Sir *Roger Palmer*, and that it could not then be set forth with precision what the remainders over were, nor whether they were capable of being barred. By the settlement which was made after the marriage, pursuant to the articles, the share of *Mary Altham*, then Lady *Palmer*, in the *Middlesex* estate, was conveyed to trustees, on trust to sell, and they were to hold the money to arise from the sale, as well as the pecuniary fortune of Lady *Palmer*, on trust to apply sums not exceeding 2000*l.* in payment of debts then owing by Sir *John Roger Palmer*, and the remainder towards payment of the incumbrances upon the estates to which Sir *John Roger Palmer* was entitled under the settlement and will of *Thomas Palmer*, and any remainder in payment of the incumbrances on the estate to which he was entitled under the will of his father Sir *Roger Palmer*.

Palmer. The estates to which Sir *John Roger Palmer* was entitled under the settlement and will of *Thomas Palmer*, as well as the estates devised by Sir *Roger Palmer*, were conveyed to trustees for 3000 years, in trust to secure to Lady *Palmer* pin money to the amount of 100*l*. a year, and a jointure to the amount of 600*l*. a year, to secure portions to the younger children, and, subject to the term, to Sir *John Roger Palmer* for life, with remainder to the first and other sons of the marriage, with remainder to Sir *John Roger Palmer* in fee.

Recoveries were suffered to carry the settlement into effect. At the date of the marriage a suit was depending in *Ireland* to foreclose a mortgage on the estates which had belonged to Sir *Roger Palmer*. This suit was prosecuted to a hearing; the estates, or some of them were sold, and the monies arising from the sale were applied in paying off incumbrances on the estate.

The *Middlesex* estate of Lady *Palmer* was not sold, nor was the 2000*l*. mortgage money, to which she was entitled, received by the trustees until long afterwards. The consolidated bank annuities and reduced 3 per cent. annuities appeared to have been applied to the use of Sir *John Roger Palmer*.

In the year 1794 *Thomas William Altham* died intestate, and Lady *Palmer*, as his sole next of kin and legal personal representative, became entitled to receive his share of the mortgage money. In the year 1809 Sir *John Roger Palmer* sold an annuity of 70*l*. per annum to *William Raddon* for the sum of 420*l*.; and by an indenture dated the 26th of *August* 1809, and made between Sir *John Roger Palmer* of the first part, *William Raddon* of the second part, and *Robert Raddon* of the third part, after reciting the will of *Thomas Hanway*, his

1836.
BOOTH
v.
LEYCESTER.

his death, the death of *Thomas Altham* and of *Thomas William Altham*, and that Sir *John Roger Palmer* was entitled to 4000*l.* in right of his wife, and that recoveries had been suffered, and provisions had been made for Lady *Palmer*, but not noticing the settlement in terms, Sir *John Roger Palmer*, for the consideration therein mentioned, granted to *William Raddon* and his assigns an annuity or clear yearly sum of 70*l.* during the natural life of him the said *John Roger Palmer* to be charged upon and payable out of all the undivided moiety of Sir *John Roger Palmer*, either in his own right or in the right of his wife, of the messuages, lands, and hereditaments, situate in the county of *Middlesex*, theretofore belonging to the said *Thomas Hanway*, deceased, with the usual powers of distress and entry for recovering of the said annuity, and all costs, losses, charges, damages, and expenses which should be occasioned by non-payment of the same on the days and times therein appointed for payment thereof. And Sir *John Roger Palmer* thereby also granted and demised the said moiety of the said estates in the county of *Middlesex* unto the said *Robert Raddon* and his assigns for the term of ninety-nine years, if the estate of the said Sir *John Roger Palmer* therein should so long continue, upon trust for the better securing to the said *William Raddon* and his assigns the due payment of the said annuity, and all costs, losses, damages, and expenses which should be occasioned by non-payment of the same on the days and times appointed for payment thereof, either by receipt of the rents or by sale or mortgage of the said moiety, or a competent part thereof, for all or any part of the said term of ninety-nine years. And the said Sir *John Roger Palmer* thereby assigned unto the said *Robert Raddon* and his assigns the said principal sum of 4000*l.* consisting of the said sums of 2000*l.* and 2000*l.* upon trust for the more effectually securing the payment of the said annuity.

On

1836.

BOOTH v. LEYCESTER.

On the same day a warrant of attorney was executed to confess judgment for 840*l.* in an action of debt for so much money borrowed, and judgment was signed on the 28th of *July* 1810.

Sir *John Roger Palmer* also sold an annuity of 50*l.* to *John Cronk* for 300*l.*; and on the 2d of *March* 1811 an indenture was executed between Sir *John Roger Palmer* of the first part, *William Henry Palmer* of the second part, and *John Cronk* of the third part, whereby Sir *John Roger Palmer* and *William Henry Palmer* covenanted that they would, during the life of Sir *John Roger Palmer*, pay to *Cronk* the annuity of 50*l.* without abatement; and there was a clause of redemption on payment of 312*l.* 10*s.* and all costs, charges, and expenses. This annuity was also secured by a warrant of attorney to confess judgment for the debt, and judgment was signed on the 29th of *February* 1812.

Many other annuities, amounting in the whole to upwards of thirty, were granted by Sir *John Roger Palmer* during his life-time. Some of these annuities were secured by way of demise and assignment, with powers of distress and entry in the form of that granted to *Raddon*, and others by covenants in the form of that granted to *Cronk*; but in both cases the annuities were secured by warrants of attorney upon which judgments were entered up.

On the 6th of *February* 1819 Sir *John Roger Palmer* died intestate and without issue. It was alleged that some years previously he had become extremely embarrassed and had retired to the *Isle of Man*, but the proof of these allegations failed.

After the death of Sir *John Roger Palmer*, Lady *Palmer*, his widow, received her jointure of 600*l.* a year out of the *Irish* estates, and the surviving trustee of the settlement

1836.

BOOTH v. LEYCESTER.

ment received and accumulated the rents of the *Middlesex* estate.

In *April* 1829 Lady *Palmer*'s share of the mortgage money, viz. 2000*l*., was received by the trustees of the settlement and invested.

On the 27th of *September* 1831, the Plaintiff *Booth* purchased the arrears of *Raddon*'s annuity, said to amount to 486*l*. 3*s*. 6*d*., for 98*l*., and took an assignment of it; and on the 19th of *November* 1831 he purchased the arrears of *Cronk*'s annuity, said to amount to 358*l*. 17*s*. 7*d*., for 100*l*., and took an assignment of it.

Lady *Palmer* died on the 26th of *November* 1832; and as there was no issue of the marriage, the ultimate remainder in the *Irish* estates under the settlement became vested in Sir *John Roger Palmer*. The trust estates of Lady *Palmer* had not been sold and applied in exoneration of the *Irish* estates, and it appeared that, under the circumstances, the absolute interest in them had in equity become vested in Sir *John Roger Palmer*, subject to the payment of his debts.

The Plaintiff *Booth* filed his bill in *January* 1833, and, claiming to be entitled under the before-mentioned assignments and others, he insisted on payment out of the estate which had been Lady *Palmer*'s, and alleged that Sir *William Henry Palmer*, as heir-at-law of his brother, claimed an interest in the *Middlesex* estate, and was, as heir-at-law, seised in fee simple of the *Irish* estates.

Sir *William Henry Palmer* filed his bill in the month of *March* following. He alleged that the annuities were not payable, and that he, as only brother and heir-at-law and sole next of kin of Sir *John Roger Palmer*, became absolutely

1836.
Booth
v.
Leycester.

absolutely entitled in fee to all such parts of the *Irish* estates as were not sold under the decree in *Ireland*, and entitled for his own benefit to a specific execution of the trusts of the settlement made on the marriage of Lady *Palmer*; namely, to have the money arising therefrom applied in aid and exoneration of the *Irish* estates, which descended to and vested in him as the heir-at-law and sole next of kin of Sir *John Roger Palmer*, subject to the satisfaction of such valid and *bonâ fide* debts as affected either the unsold *Irish* estates or the *Middlesex* estate, or the accumulated rents thereof, or the mortgage money of 2000*l.*

Upon these allegations the two causes being at issue, evidence having been taken and the causes being set down to be heard,

Mr. *Tinney*, for the Plaintiff in the cross bill, obtained an order, as of course, to dismiss that bill; and he afterwards in the first suit took a preliminary objection for want of parties, on the ground that it appeared from the will of Sir *Roger Palmer*, that Sir *William Henry Palmer* was only tenant for life, instead of tenant in fee, of the devised *Irish* estates, and that his eldest son, who was tenant in tail in remainder, was a necessary party, and ought to be before the Court.

Mr. *Pemberton*, *contrà*, contended that this objection could not be sustained. Sir *William Henry Palmer* had claimed by his cross bill as tenant in fee, and now upon reference to the will of Sir *Roger Palmer* it was said to be discovered that he had been under a total mistake; and that he was only tenant for life. An order of course to dismiss the cross bill had been irregularly obtained when it had been set down for hearing with the other cause, and the proceedings in that other cause were sought to be delayed, and to be recommenced upon a new

1836.

BOOTH v. LEYCESTER.

a new footing. Money having been paid into Court, it was impossible for the Plaintiff in the cross cause to get his bill dismissed upon an *ex parte* application. The Court would not, under such circumstances, permit Sir *William Henry Palmer* to recede from his claim, and to make an entirely new case; but would proceed without regard to the supposed interests of the remainder-man.

Upon the question as to the regularity of the order obtained by the Plaintiff in the cross cause to dismiss his bill, the Registrar in Court, having been referred to, was of opinion that the cross cause having been set down to be heard with the original cause, the Plaintiff in the cross cause could not regularly obtain an order, as of course, to dismiss his bill, but that the motion for that purpose ought to have been special.

Feb. 29. The cause stood over for the purpose of affording an opportunity of examining cases as to the practice, and on a subsequent day the following cases were referred to in support of the *ex parte* order obtained by the Plaintiff in the cross cause for the dismissal of his bill: *Carrington* v. *Holly* (*a*), *Locke* v. *Nash* (*b*), *Davis* v. *The Duke of Marlborough* (*c*), *Small* v. *Atwood*, *White* v. *Lord Westmeath*. (*d*)

On the other side, *Cooper* v. *Davis* (*e*) was cited, and it was contended that the present was the case of a cross bill, not an original suit; and that the Plaintiff in the cross bill could not, after the causes had been set down for hearing, and it had been agreed that evidence in one cause should be read in the other, deprive the Plaintiff in the original cause of the benefit of the matter put in issue

(*a*) 1 *Dick.* 280.
(*b*) 2 *Mad. Treat. on Eq.* 389. n.
(*c*) 2 *Swanst.* 167.
(*d*) *Beat.* 174.
(*e*) Reg. Lib. 1798.

issue in the two suits; that no authority had been cited which applied to the present case, and that the opinion of the most experienced officers of the Court was that the order was irregular.

The MASTER *of the* ROLLS said that Sir *William Henry Palmer*, when he made the discovery that he had, in his answer to the original bill, and in the cross bill, totally mistaken his interest, and the character which he filled, instead of applying to the Court to be relieved from the consequences of his mistake, had thought fit to lie by till the very day on which the two causes were set down for hearing, and then endeavoured, upon an *ex parte* application, to withdraw from the cause, when, for any thing the Court knew to the contrary, the Plaintiff in the original cause might be greatly prejudiced by that proceeding. His Lordship had a strong impression at first that a Plaintiff might dismiss his own cause upon payment of costs at any time; but, upon inquiring into the practice, he found the rule to be otherwise, and it was certainly quite reasonable that a Plaintiff ought not to have the power of dismissing his bill, when by so doing he might prejudice the Defendant. His Lordship was of opinion that the application to dismiss the bill ought to have been made specially, and that the objection for want of parties could not be sustained. It was admitted, on the part of the Plaintiff in the cross suit, that there was no ground upon which his bill could be maintained. It was unnecessary, under the circumstances, for the Court to look at the allegations in the cross bill; but the original cause must proceed.

The question in the cause was, whether the Plaintiff was entitled to interest upon the arrears of the annuities.

Mr.

1856.

BOOTH v. LEYCESTER.

Mr. *Pemberton* and Mr. *Wright*, for the Plaintiff.

The only material point in the cause is one of considerable difficulty. In ordinary cases of annuities given by will, or in bar of dower, it is now settled that the Court will not allow interest upon arrears. But the authorities go to this extent, that there are cases in which interest will be allowed on the arrears of an annuity; and those cases are, first, where the nature of the security is such that if the remedy were enforced at law, and possession taken, the party so taking possession would be entitled at law to retain it, until he was satisfied not only as to the gross amount of the arrears, but also as to interest upon those arrears; and, secondly, where the conduct of the party who has granted the annuity, or the situation of the property subject to the annuity is such as to make it not the fault of the creditor that he has not prosecuted his remedies at law, but the fault of the debtor. Upon principle it is difficult to understand why, where an annuity has been purchased and permitted to fall into arrear, the party to whom it is granted should not have interest upon his annuity, as well as upon any other debt. The distinction between annuities given by will, or granted by way of jointure or rent charge, and annuities purchased and redeemable at the option of the grantor being conceded, upon what principle of justice can the purchaser of an annuity be denied the fruit of that interest, where it has not been paid, which is the very foundation of the contract? The purchaser of a redeemable annuity contracts either to receive back the principal sum at the option of the grantor, or to be paid by certain instalments, taking the chance of receiving upon the whole a larger or a smaller sum. The principle which prevents the Court from giving interest upon the arrears of an annuity by way of jointure or rent-charge, does not apply to a case of this description,

where

1836.

BOOTH v. LEYCESTE

where a bond has been executed or a judgment entered up, what is it which the bond or judgment is to secure? Not the mere payment of the arrears of the annuity, but the payment of all costs, losses, and damages which the creditor may sustain by reason of the non-payment of the annuity at the stipulated period, and one of these losses is the loss of the interest which he might have made upon the annuity if it had been duly paid. It is considered, in courts of justice, that interest for non-payment is equivalent to the actual receipt of the money. In truth it falls very far short of an equivalent; but that very circumstance proves that there is a loss for which an actual equivalent ought to be paid. The remedy is at best insufficient, but the insufficiency of the remedy shews the positive nature of the damage. To say that by granting the remedy you give interest upon interest, which is against law, is a fallacy founded upon a confusion of time and the nature of the contract; for the remedy is after all imperfect, and the party receiving it is not placed in as beneficial a situation as he would have been if the annuity had been duly paid. The contract between the parties is, that the grantee of a redeemable annuity shall, till the grantor chooses to redeem it, receive certain instalments; and that, if the payment of those instalments be withheld, he shall receive a certain compensation by way of damages, and there is no legal or equitable principle which can prevent such a contract from being carried into effect.

In the present case the annuity to *Raddon* is secured by an assignment; by a right of entry and distress; and by a term of years vested in trustees for the express purpose of raising out of the rents and profits, either by sale or mortgage, whatever indemnity the creditor may be entitled to. It is further secured by a warrant of attorney

1836.

BOOTH v. LEYCESTER.

to confess judgment for the debt and damages, which judgment has been entered up. The right for which the Plaintiff contends is supported by authorities. In *Newman* v. *Auling* (*a*), where the annuity was granted to the Plaintiff by way of maintenance, and a bond was given to secure the payment of it, Lord *Hardwicke* decreed interest on the arrears to be computed at the end of each half year. In *Gay* v. *Cox* (*b*), a son entitled to a remainder in tail joined with his father, the tenant for life, in suffering a recovery, and they then executed a mortgage. The mortgagee having executed a bond, conditioned for the performance of covenants in a deed to secure an annuity to the son, it was held, upon appeal from the decree of the Lord Chancellor of *Ireland*, that as damages might be recovered at law for a breach of the covenants to an amount not exceeding the penalty, equity would give interest upon the arrears of the annuity. This case is in point with the present, the only difference being, that whereas the annuity was there secured by a bond, there is here a judgment, the perfection of that security of which a bond is only the commencement. There is another case of *Power* v. *Bennis* in the same book (*c*), where a decree of the Lord Chancellor of *Ireland* giving interest upon the arrears of an annuity was affirmed upon appeal. *Tew* v. *The Earl of Winterton* (*d*), and *Creuze* v. *Hunter* (*e*), will probably be cited on the other side; but in *Tew* v. *The Earl of Winterton* the annuity was in bar of dower; and in *Creuze* v. *Hunter* the circumstance which distinguishes this case did not exist, namely, the impossibility of using that legal diligence, which would have enabled the

(*a*) 3 *Atk.* 579.; and see *Seton on Decrees*, 108.

(*b*) 1 *Ridgew.* 153.

(*c*) 2 *Ridgew.* 256.

(*d*) 3 *Bro. C. C.* 489.; and 1 *Ves. jun.* 451.

(*e*) 2 *Ves. jun.* 157.

1836.
BOOTH v. LEYCESTER.

the creditors to reap the benefit of their contract, the property being trust property, and not to be reached at law. Moreover the income of the property not being sufficient to pay Lady *Palmer*'s annuity, the creditors were without remedy both at law and in equity until after her decease. Where the creditor has, by no fault of his own, been prevented from effectually enforcing his legal remedies, that circumstance constitutes a special case, in which the Court will give relief. The Plaintiff is entitled to have his bill considered as an action upon the judgment, in which the Court may award interest, in like manner as interest would have been obtained, if an action had been brought upon the judgment.

The following cases were also cited and commented upon, on the part of the Plaintiff; *Ferrers* v. *Ferrers* (*a*), *Drapers' Company* v. *Davis* (*b*), *Litton* v. *Litton* (*c*), *Legatt* v. *Shewell* (*d*), *Robinson* v. *Cumming* (*e*), *Godfrey* v. *Watson* (*g*), *Stapleton* v. *Conway* (*h*), *Morris* v. *Dillingham* (*i*), *Morgan* v. *Morgan* (*k*), *Bignal* v. *Brereton* (*l*), *Bedford* v. *Coke* (*m*), *Bradshaw* v. *Astley* (*n*), *Judd* v. *Evans* (*o*), *Holdipp* v. *Otway* (*p*), *Bann* v. *Dalzell* (*q*), *O'Donel* v. *Brown*. (*r*)

Mr. *Tinney*, Mr. *Kindersley*, Mr. *Spence*, and Mr. *Lovat*, *contrà*.

Supposing the validity of these annuities to be made out, which we do not admit, the question is, whether the

(*a*) *Ca. temp. Talb.* 2.
(*b*) 2 *Atk.* 211.
(*c*) 1 *P. Wms.* 541.
(*d*) *Gilb. Ch. Ca.* 145.
(*e*) 2 *Atk.* 409.
(*g*) 3 *Atk.* 517.
(*h*) 1 *Ves.* sen. 427.
(*i*) 2 *Ves.* sen. 170.
(*k*) 2 *Dick.* 643.
(*l*) 1 *Dick.* 278.
(*m*) 1 *Dick.* 178.
(*n*) 4 *Bro. P. C.* 505.
(*o*) 6 *T. R.* 399.
(*p*) 2 *Saund.* 107.
(*q*) 3 *Carr. & Payne*, 376.
(*r*) 1 *Ba. & Be.* 262.

1836.

BOOTH v. LEYCESTER.

the Plaintiff, as assignee of the annuities, is entitled to interest upon the arrears. The grounds upon which the claim of the Plaintiff was put, were, first, the form and nature of the securities; and, secondly, the conduct of the parties, and the situation of the property. As to the second ground, there is an entire absence of all evidence, and it is unnecessary, therefore, to consider that part of the argument.

The form of the annuities differs in no respect from the common printed form given in *Sanders* (*a*) and *Barton*; and the only question is, therefore, whether the nature of the security is such that, in the absence of all special circumstances, the Court will give interest upon the arrears. The Court, no doubt, in the earlier cases exercised a considerable discretion in this matter; but in all the cases which can now be considered as authorities, where the Court has given interest upon the arrears of an annuity, there have been special circumstances which are altogether wanting in the present case. In the *Drapers' Company* v. *Davis* (*b*), Lord *Hardwicke* observes, that the first case in which interest was given on the arrears of an annuity, was *Ferrers* v. *Ferrers* (*c*); but that it had been done in many instances since, and for the most part where it was the bread of the wife or child. He repudiates the distinction which had been made where the annuity arose upon a contract, and which is still insisted upon in the present case; but he concludes by giving interest upon the arrears of the annuity from the date of the report; and that, not in favour of a wife or child, but of the representative only of the annuitant. In *Newman* v. *Auling* (*d*) Lord *Hardwicke* went upon the circumstance of the annuity

(*a*) *Treat. on Uses and Trusts. Append.*
(*b*) 2 *Atk.* 211.
(*c*) *Ca. tem. Talb.* 2.
(*d*) 3 *Atk.* 579.

1836.

BOOTH v. LEYCESTER.

nuity being for maintenance; a distinction which has not been followed in the later cases. In *Tew* v. *The Earl of Winterton* (*a*), Lord *Thurlow* refused to give interest on the arrears of an annuity secured by bond in bar of dower; and in *Creuze* v. *Hunter* (*b*), on appeal from the Lords Commissioners, Lord *Loughborough* went very fully into the consideration of this subject, and held that interest could not be given on principal and interest reported due on annuities by the Master. That decision has been uniformly followed.

In *Anderson* v. *Dwyer* (*c*), interest on the arrears of an annuity bequeathed to a married woman to her separate use was refused, though there was a large *residuum*, and Lord *Redesdale* observes that "the result of the cases in the Court of Chancery in *England* has been to refuse interest except under very particular circumstances; and though it seemed to be the justice of those cases to give interest, it has been found the wisest way not to do so, as the principle might be extended so far as to be highly mischievous, and tend to create litigation in every case, and to encourage creditors to delay the prosecution of their suits."

It is supposed that, if an action had been brought upon the judgment, interest upon the arrears would have been recovered, as a matter of course; but that is by no means the case. It is for the jury to assess the damages, and the amount of the damages will depend upon the nature of the debt, and the conduct of the debtor: *Bann* v. *Dalzell*. (*d*) In *Gaunt* v. *Taylor* (*e*), the

(*a*) 3 *Bro. C. C.* 489.; and 1 *Ves.* jun. 451.

(*b*) 4 *Bro. C. C.* 316. under the title of *Creuze* v. *Lowth*; and 2 *Ves.* jun. 157.

(*c*) 1 *Sch. & Lef.* 301.

(*d*) 3 *Carr. & Payne*, 376.

(*e*) Now reported in 3 *Mylne & Keen*, 309.

1836.
BOOTH
v.
LEYCESTER.

the last case relating to this subject, the report of which is not yet published, interest was not allowed on a judgment debt in the Master's office, and Sir *John Leach*, in his judgment, makes the following observations: — "At law a judgment does not carry interest, but interest may be recovered at law in the shape of damages by an action on the judgment. Interest will also be given at law, where the effect of the judgment has been impeded by a course of dilatory and vexatious proceedings on the part of the debtor. In like manner, and upon the same principle, the Court of Exchequer Chamber, affirming the judgment upon a writ of error, will give interest upon a judgment, if the original debt carried interest, but not otherwise. So, if an application be made, on the part of the debtor, to a court of law for its assistance or indulgence in matters regarding the judgment, it will be granted only on the condition of the debtor paying interest on the judgment. It appears by the authorities which have been cited, that equity in this respect follows the law; and, as a general rule, a judgment creditor is not allowed interest on his judgment in the Master's office. The same vexatious course of proceeding, which would entitle the creditor to interest at law, will certainly entitle him to interest on his judgment in equity. So, if the debtor apply in equity for the assistance or indulgence of the Court, it will be granted only upon the terms of paying interest on the judgment."

As to the cases cited from *Ridgeway*, the book in which they are reported, containing the appeal cases determined in the Upper House of Parliament in *Ireland* during the short period between 1784 and the Union in which the appellate jurisdiction was restored, is not of very high authority; and, if they bore more directly than they do upon the point in question, could

not

1836.

BOOTH v. LEYCESTER.

not be relied upon against the strong current of authorities on the other side. Those cases, however, do not, in fact, affect the point in question; for in *Gay* v. *Cox* the language of the annuity deed was special, and the conduct of the Respondent was sufficient to warrant the decree made in favour of the Appellant; and *Power* v. *Bennis* establishes nothing, because the circumstances under which the interest of the arrears on the annuity was given do not appear from the report.

The following authorities were also referred to: *Gordon* v. *Swan* (*a*), *Marshall* v. *Poole* (*b*), *Lowndes* v. *Collens* (*c*), *Page* v. *Newman* (*d*), *Foster* v. *Weston* (*e*), *Sackett* v. *Bassett* (*g*), *M'Neil* v. *Jolly* (*h*), *Aylmer* v. *Aylmer* (*i*), *Lewes* v. *Morgan* (*k*), *Berrington* v. *Evans.* (*l*)

Mr. *Pemberton*, in reply.

The MASTER *of the* ROLLS (after stating the facts.)

April 16.

The two causes having been set down to be heard, attempts were made on the part of Sir *William Henry Palmer*, first, to dismiss his cross-bill, and next to raise an objection for want of parties, on the ground that he was only entitled for life to the estates which by his bill he claimed to be his in fee. I thought that these attempts could not be supported; and certain difficulties respecting the Plaintiff's proofs of the assignments made to him being overcome, the only remaining question was,

(*a*) 12 *East.* 419.
(*b*) 13 *East.* 98.
(*c*) 17 *Ves.* 27.
(*d*) 9 *B. & Cress.* 378.
(*e*) 6 *Bing.* 709.
(*g*) 4 *Mad.* 58.
(*h*) 2 *Dow & Clark*, 454.
(*i*) 1 *Molloy*, 87.
(*k*) 3 *Yo. & J.* 394.
(*l*) *Younge*, 276.

1836.

BOOTH v. LEYCESTER.

was, whether the Plaintiff *Booth* is entitled to interest on the arrears of the annuities which he has purchased.

In the ordinary case of dower, or jointure, or rent-charge, or of annuity given by will, and no special circumstances in the case, it was admitted that the annuitant would not be entitled to interest on arrears; but it is said that the case is different, first,—where the nature of the security is such that if the remedy had been enforced at law and possession taken, the party would have been entitled to retain possession till he was satisfied, not only in respect of the principal but of the interest on the arrears; secondly, where the conduct of the grantor, or the situation of the property is such that the creditor could not by any diligence of his own have procured payment, but took all necessary steps as soon as he had any prospect of obtaining fruit from his diligence.

As I am of opinion that the facts on which the second point is raised are not made out in evidence, it is not necessary to consider that.

As to the first point, the contract was for the purchase of a redeemable annuity during the life of Sir *John Roger Palmer*. The securities were of two kinds, one by demises and assignments, with power to distrain and enter, and after entry to continue in possession till payment of the arrears, and all such costs, charges, damages, and expenses as should be occasioned by non-payment. The other securities were by mere covenants, but in both cases there were judgments for the debt and damages.

A great many cases were cited. In the older cases the Court considered that it was a matter of discretion to give or refuse interest on the arrears of annuities. That

That notion has long been exploded, and it has been considered that a special case is necessary. If the annuitant is delayed in his proceedings at law by the interposition of this Court at the instance of the debtor; or if the debtor seeks the aid of this Court to relieve him from the hardship to which he may be exposed at law, this Court will allow interest on the arrears; and the principal question here is, whether this is such a special case as, according to the principle on which the Court has acted, entitled the annuitant to interest on the arrears. The mere nature of the contract does not entitle him to such interest. There is nothing in the instruments to shew that interest on the arrears was in contemplation, and the successive payments, which were contracted for, were not absolute payments to be made at any fixed times, but contingent payments to be made if Sir *John Roger Palmer* should be living at the appointed times. The case of *Robinson* v. *Cumming* (*a*) shews that the right of entry, as to the annuities in respect of which there was a right of entry, does not give a right to interest on arrears; and the case is not in this Court advanced by the authority to hold till all costs, charges, damages, and expenses are paid.

The case of the Plaintiff as to interest on arrears, if to be supported, must rest on the judgments. It was argued that, as the Plaintiff comes here only because the property against which he claims is trust property, and cannot be reached at law, this bill ought to be considered as an action on the judgment, in which interest may be recovered in the shape of damages; but it is to be considered, that even at law, in an action on the judgment, it is for the consideration of the jury whether, under all the circumstances, interest on the judgment

(*a*) 2 *Atk.* 611.

1836.

BOOTH v. LEYCESTER.

judgment shall be recovered; and in a court of equity, unless there be a special case independently of the mere judgment, interest on the judgment is not allowed. In *Gaunt* v. *Taylor* (*a*), Sir *John Leach* says, "At law a judgment does not carry interest, but interest may be recovered at law, in the shape of damages, by an action on the judgment. Interest will also be given at law on a judgment at law, where the effect of the judgment has been impeded by a course of dilatory and vexatious proceedings on the part of the debtor. Equity in this respect follows the law, and, as a general rule, a judgment creditor is not allowed interest on his judgment in the Master's office. The same vexatious course of proceeding, which would entitle the creditor to interest at law, will certainly entitle him to interest on his judgment in equity."

It is, however, further argued, that there are authorities which warrant this claim, and three cases relied upon, for the Plaintiff, were *Newman* v. *Auling* (*b*), *Gay* v. *Cox* (*c*), and *Power* v. *Bennis*. (*d*) The last of these cases cannot be relied on for this purpose, as the report does not shew under what circumstances interest on the arrears of the annuity were given; and, quite independently of that question, there were in that case sufficient reasons for dismissing the appeal. In *Gay* v. *Cox* it appears, that *Gay* the appellant had been prevented from receiving the annuity out of the appropriated lands by the appointment of receivers by the Court at the instance of *Cox*, who had himself, by means of the receivers, obtained the rents which ought to have been applied in keeping down the arrears of the annuity. And in *Newman* v. *Auling* it was thought important that the security was given for maintenance, a principle

(*a*) 3 *Mylne & Keen*, 309.
(*b*) 3 *Atk.* 579.
(*c*) 1 *Ridgew.* 153.
(*d*) 2 *Ridgew.* 256.

a principle which was rejected in subsequent cases; and, upon the whole, I am of opinion that I could not decree an account to be taken of the interest on the arrears of these annuities without acting in contradiction to the principle which has governed the Court in cases of this nature for many years past.

1836.

BOOTH v. LEYCESTER.

WHATTON *v.* CRADOCK.

July 13, 14.

THE bill was filed for the purpose of having the estates devised by the testator in the cause sold free from incumbrances; and the trusts of the will carried into execution. By the decree at the hearing it was referred to the Master to inquire what incumbrances were subsisting upon those estates, and it was ordered that the estates should be sold. The Master by his report, dated in *April* 1835, found, among other things, that the principal sum of 1200*l.*, and 315*l.* interest, making the aggregate sum of 1515*l.*, were due to *Isaac Faulkner* in respect of a mortgage. The estates were sold, and the purchase-money paid into Court; and upon the reference back to the Master to compute subsequent interest and costs directed at the hearing on further directions,

Where the amount of principal and interest due upon a mortgage has been found by the Master's report, the rule now is to compute subsequent interest upon the principal only; and the time for payment of the money found due upon a mortgage is enlarged upon the terms of paying the interest and costs found due.

Mr. *John Romilly*, for the incumbrancer, submitted that he was entitled to have interest computed upon the aggregate sum of principal and interest found due by the Master from the date of the report; and he cited *Bickham* v. *Cross* (*a*), where Lord *Hardwicke* laid it down

(*a*) 2 *Ves.* sen. 471.

1836.

WHATTON v. CRADOCK.

down as the rule of the Court, "that where the mortgagor came to redeem, and the mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest, and costs, all that is considered as one accumulated, consolidated sum; and if the Court enlarges the time, and it goes back to the Master to compute subsequent interest and costs, the Master reports the subsequent interest upon the whole sum."

Mr. *Pemberton* and Mr. *Kindersley, contrà.*

July 14. *The* MASTER *of the* ROLLS.

From an early period it was considered that the Master's report finding the interest due on a mortgage debt made that interest principal, and that, if payment was delayed, interest was to be computed from the date of the report upon the aggregate amount of the principal, previous interest, and costs; and on enlarging the time for payment of what was found due to the mortgagee on his bill of foreclosure, the course was to give him interest on the whole sum previously found due for principal, interest, and costs. This was held to be the practice by Lord *Hardwicke* in the case referred to, though that case was attended by peculiar circumstances not stated in the report, and it was admitted by the registrar and counsel in *Perkyns* v. *Baynton* (*a*), a case before Lord *Thurlow*. The case of a mortgage in that respect is distinguished by Lord *Loughborough* in *Creuze* v. *Hunter* (*b*) from an annuity, or debt not bearing interest. And in *Turner* v. *Turner* (*c*), Sir *Thomas Plumer* recognising this rule as to a mortgage, distinguishes the case of a mortgage from a bond debt, in which

(*a*) 1 *Bro. C.C.* 574.
(*b*) 2 *Ves.* jun. 159.
(*c*) 1 *J. & W.* 47.

which latter case he held that interest upon the aggregate amount of principal and interest could not be given.

But the practice is now different, and the time for paying what is found due on the mortgage is enlarged upon payment of the interest and costs found due, and the subsequent interest on the principal only, and subsequent costs are directed to be computed and taxed. And a distinction has been taken between a decree for sale and payment of incumbrances according to their priorities, and a decree for foreclosure. Thus Lord *King*, in *Neal* v. *The Attorney-General* (*a*), refused to give interest upon the whole sum reported due for principal, interest, and costs to a prior against a subsequent incumbrancer, but without prejudice if there should be a surplus. So in *Harris* v. *Harris* (*b*), Lord *Hardwicke* recognised the distinction between the case of a foreclosure and a decree for sale. And in cases of this nature, where the amount of principal and interest due upon a mortgage has been found by the Master's report, and it has been referred back to the Master to compute subsequent interest, it has been the practice, for many years past, to compute such subsequent interest upon the principal only.

(*a*) *Mose.* 246. (*b*) 3 *Atk.* 722.

1836.

July 19.

MEREDITH *v.* BOWEN.

Interest at 4 per cent. ordered to be paid upon a debt, not in its nature bearing interest, vexatiously withheld by a husband from the executor of his deceased wife.

THE demand of the Plaintiffs in this suit, which arose out of a contract not in its nature carrying interest, having been established by an issue, and it appearing by a letter of the Defendant *Williams*, dated the 12th of *February* 1831, that he had expressed his determination not to pay the sum in question, unless compelled by law, it was now asked, on the part of the Plaintiffs, at the hearing on further directions, that the Defendant *Williams* might be ordered to pay interest at 5 per cent. on the debt wrongfully detained by him from the date of his refusal to pay it. The facts of the case are stated in his Lordship's judgment.

For the Plaintiffs, *Arnott* v. *Redfern* (*a*) was cited as an authority which proved that, where there had been a wrongful withholding of a debt arising out of a contract which did not carry interest, interest in the shape of damages might be allowed by the jury for the unjust detention of the money; and it was argued that the Defendant *Williams* having improperly delayed the payment of a just demand, the case fell within that class of recognised exceptions to the general rule, where a court of equity would grant interest upon an annuity, or other debt not in its nature bearing interest; *Booth* v. *Leycester*. (*b*) In this case, the debt, consisting of money advanced by a wife out of her separate property to her husband, could not be recovered at law.

Mr.

(*a*) 3 *Bing*. 353. (*b*) *suprà*, p. 247.

1836.

MEREDITH v. BOWEN.

Mr. *Tinney*, Mr. *Temple*, Mr. *Bethell*, and Mr. *Metcalfe*, for the Plaintiffs.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *James Russell*, *contrà*.

The MASTER *of the* ROLLS.

Elizabeth Williams, being entitled to a sum of stock in the new 4 per cent. annuities to her separate use, advanced to her husband, the Defendant *Thomas Williams*, out of that property the sum of 1000*l.* by way of loan; and by her will, dated the 13th of *January* 1830, she made the following bequest: "I leave 1000*l.*, now in Mr. *Williams*'s hands, and 1000*l.*, in the new fours, to *Richard James*;" out of which *James* was to pay the annuities therein mentioned to the Plaintiffs.

The testatrix died shortly after the date of her will, and a few days after her decease a copy of the will was sent by her executor to her husband. It does not appear that any direct demand of payment was made by the executor at that time; but from a letter addressed shortly afterwards to the executor by *Thomas Williams*, it appears that the husband expressed his dissatisfaction at the bequest made by his deceased wife, and declared that he never would pay the sum of 1000*l.*, unless compelled by law. For some reason, which does not appear, the executor seems to have considered that he had not the means of recovering his demand, and no steps were taken by him for that purpose. The Plaintiffs, who are the annuitants entitled under the specific bequest, seem also to have been of the same opinion, for in their bill, which was filed in *April* 1832, they state that the money could not be recovered; and it was not

1836.

MEREDITH v. BOWEN.

not until *April* 1833 that they altered their opinion in that respect, and, upon an amended bill, insisted that the money might be recovered, and would have been recovered but for collusion between the executor and *Thomas Williams* the husband. *Williams* insisted that the money which was represented to have been advanced to him by his wife as a loan, was, in point of fact, a gift. The evidence being conflicting as to that point, an issue was directed, at the hearing of the cause, to try whether the money was advanced by way of loan, or was intended to be a gift; and, after an unsuccessful appeal by the Defendant *Williams* from the order directing the issue, that issue has been found in favour of the Plaintiffs. The fact that it was a loan having been established, the question now is, whether or not *Williams* shall pay interest upon the 1000*l.* What was the precise nature of the contract, and whether *Williams* was to pay interest or not to his wife during her life is not in any way established. No assistance, then, being afforded by the nature of the contract between the parties at the time the loan was made, what is to govern the Court in deciding the question, whether interest is or is not to be recovered? It appears from the letter that *Williams* was aware what would be the consequence of his resistance to the payment of the money, and yet refused to pay it. He puts the parties to a suit to recover their rights, and declares his intention to interpose every obstacle in their way until he is compelled to pay by law.

It is impossible for me to consider this otherwise than as a vexatious resistance. He might have had reason to think it a gift rather than a loan; but the fact of its being a loan and not a gift having been established, I am bound to declare, — and I should be giving a premium

mium for a resistance which must be considered as vexatious if I held otherwise, — that he must pay interest upon the amount of the 1000*l.* from the date of his refusal to pay it, and, under all the circumstances, the case being one not entirely free from hardship, at 4 per cent. With respect to the costs of the suit, those which relate to the taking of the accounts must be borne by the estate of the testatrix, and those which relate to the recovery of the specific legacy must be paid by the Defendant *Williams*.

1836.

MEREDITH v. BOWEN.

HOBSON *v.* BLACKBURN.

July 20.

The Court will not marshal assets in favour of a charitable bequest given out of a mixed fund, whether the bequest be particular or residuary.

THE testator gave a charitable legacy out of a fund composed of pure personalty and leaseholds, and the general personal estate being insufficient for the payment of the legacies,

Mr. *Turner*, on the part of the persons interested in the charitable legacy, submitted that, as this was a particular, and not a residuary charitable bequest, the legatees were entitled to have the assets marshalled in favour of the charity. It was true that the rule * of late years had been, where charitable legacies were given out of a mixed fund applicable to the payment of legacies, to pay the legacies out of the mixed fund *pro rata*, appropriating, in the case of the charitable legacies, their proportion

* See the decree in the *Attorney-General* v. *Winchelsea* in *Seton's Forms of Decrees*, p. 130., and *Shelford's Law of Mortmain*, p. 234.

1836.

HOBSON v. BLACKBURN.

portion only of the pure personalty; but there had been no reported case on the point since *Makeham* v. *Hooper* (*a*), in which case the *Attorney-General* v. *Winchelsea* (*b*), where the bequest was residuary, was relied upon, and the distinction between a particular legacy and a residuary gift was not adverted to. In the *Attorney-General* v. *Lord Weymouth* (*c*) the testator created a mixed fund, and, after giving a particular charitable legacy, directed the residue of the produce of his real estate and his personal estate to be applied to charitable purposes. Lord *Hardwicke* distinguished between the particular legacy and the residuary gift, and, declaring the bequest of the surplus of the real estate to be void, directed the assets to be marshalled in favour of the particular legacy.

Mr. *Pemberton* said that this subject had been fully discussed before Sir *John Leach* in the *Warrington* school case, and that the rule was perfectly settled that the Court would not marshal assets in favour of a charity.

The MASTER *of the* ROLLS was of opinion that the rule applicable to the apportionment of the assets, where a testator made a charitable bequest, whether particular or residuary, out of a mixed fund, was settled, and had been so long recognised and acted upon, that, in this Court, the question could not be re-opened.*

(*a*) 4 *Bro. C. C.* 153. (*b*) 3 *Bro. C. C.* 373. (*c*) *Amb.* 20.

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* The same point was raised in the late case of *Williams* v. *Kershaw*, before the present Lord Chancellor, when Master of the Rolls. In that case there were particular charitable legacies, and a gift of the residue for such benevolent, charitable, and religious purposes as the testator's trustees should, in their discretion, think fit; and it was contended, that the particular charitable legacies ought to be made good out of so much of the residue as consisted of pure personalty. Lord *Cottenham*'s observation

observation as to this point, was as follows: — "This would be marshalling the assets at least against the next of kin, and would be contrary to the rule of the Court adopted in all such cases, which is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail, as would in that way be to be paid out of the prohibited fund."

1836.

BROWN *v.* BROWN.

July 25.

THE will of *William Brown* contained the following bequest: — "I give and bequeath unto *Edward Bowring* and *Benjamin Lawrence*, the sum of 1000*l.* sterling, upon trust to invest the same in the purchase of some or one of the public stocks or funds of *Great Britain*, in their joint names, and to lay out the same on mortgage or otherwise, at interest; and, when so invested, upon further trust to pay to, or otherwise permit and suffer my wife, *Harriet Brown*, to receive the interest and dividends thereof during the term of her natural life; and from and immediately after her decease my will and meaning is, and I direct that the said sum of 1000*l.* sterling, or the stocks, funds, and securities in or upon which the same shall be invested, shall fall into and become a part of my personal estate, and applicable to the trusts or payment of the legacies given by this my will."

Primâ facie, a testator must be presumed to intend that all his legacies should be equally paid, and the *onus* is upon those who contend for a priority, to shew that the testator meant to give a preference to a particular legatee.

A testator gave 1000*l.* to trustees, upon trust to pay the interest to his wife during her life, and after her decease he declared his will to be, that the 1000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his will; and he gave a legacy of 500*l.* in trust for *N. M.* and his wife, in nearly the same words: Held, that a priority was given to these two legacies.

The testator next gave several pecuniary legacies, and proceeded to give a legacy of 500*l.* to trustees in trust for *Noah Meadows* and his wife, for their joint lives,

1836.

BROWN v. BROWN.

lives, and the life of the survivor of them, in nearly the same words as those used in the bequest for his wife, the only difference being, that, after the decease of the survivor of them, he directed that "the said sum of 500*l.* sterling, or the stocks, funds, and securities in or upon which the same should be invested, should fall into and become a part of his personal estate, and applicable to the trusts or payment of the *several* legacies given by his will." He then gave legacies to two of his servants, and bequeathed the residue of his estate and effects to his brother, *Joseph Brown*.

The testator's estate being insufficient to pay the legacies, the question in the cause was, whether the legacies to the testator's wife, and to *Noah Meadows* and his wife were entitled to priority, or were to abate in proportion with the other legacies.

Mr. *Kindersley* and Mr. *Dixon*, for the widow.

Where an intention is manifested to make a provision for a wife or child, the Court will incline to give effect to the intention; *Lewin* v. *Lewin*. (*a*) The testator clearly intended that his wife should enjoy the income of the 1000*l.* during her life; and the capital was, after her decease, and not till then, to become a part of the testator's personal estate, and applicable to the payment of the legacies given by his will.

Mr. *Pemberton* and Mr. *Spurrier*, *contrà*.

Lewin v. *Lewin* was determined upon a special ground, which Lord *Hardwicke* explained in the subsequent case of *Blower* v. *Morrett* (*b*); and it is now well settled, that

(*a*) 2 *Ves.* sen. 415. (*b*) 2 *Ves.* sen. 420.

1836.

BROWN v. BROWN.

that a wife stands in no better situation, where the fund is deficient, than any other legatee. In *Beeston* v. *Booth* (*a*) Sir *John Leach* says, that "unless a contrary intention appear upon the will, it must be presumed that the testator considers that he has property sufficient to answer all his legacies, and that he has an equal intention that all should be equally paid." No intention to give a preference to the wife can be inferred from the language of this bequest, for the testator gives a legacy to strangers in almost the same words. In directing that these two legacies should become part of his personal estate, and be applicable, after the decease of the legatees, to the payment of the other legacies, the testator may have intended to provide for the event of their decease before the period at which the other legacies would be payable.

The MASTER *of the* ROLLS.

Primâ facie a testator must be presumed to intend that all his legacies should be equally paid, and the *onus* is upon those who contend for a priority to shew that the testator meant to give a preference to a particular legatee.

In this case the testator gives 1000*l.* to trustees, upon trust to invest the same, and pay the interest to his wife for her life; and after her decease he declares his will to be, that the 1000*l.* "should become a part of his personal estate, and applicable to the trusts or payment of the legacies given by his will;" and the legacy of 500*l.* given in trust for Mr. *Meadows* and his wife is in almost the same words, the only difference being that, in the corresponding passage, he declares that the 500*l.*

(*a*) 4 *Mad.* 168.

1836.

BROWN v. BROWN.

500*l.* shall become applicable to the payment of the "several" legacies given by his will.

If the testator had contemplated that all his legacies would be at once satisfied, it would have been unnecessary to direct that the two legacies in question should be applicable, after the decease of the legatees, to the payment of the legacies given by his will. He cannot be reasonably presumed to have contemplated, as has been suggested at the bar, the death of the three legatees to whom these two legacies are given, within a twelvemonth after his decease; and there is nothing in the language of the will which affords ground for the argument that he intended to provide for such a possibility. There is no way, therefore, in which effect can be given to the words used by the testator but by giving a priority to these two legacies.

Aug. 1.

Ex parte WHITTON.

Mortgagees and the heirs of mortgagees are within the eighth section of the 1 *W.* 4. *c.* 60., explained by the 4 & 5 *W.* 4. *c.* 23. *s.* 2.

CHARLES DILLY, being seised in fee of certain estates, subject to redemption on payment of the mortgage-money and interest, died intestate as to those estates, and all attempts to discover his heir had proved ineffectual. The petitioner was entitled in equity to those estates under a conveyance, in which the owner of the equity of redemption joined with the executors of *Charles Dilly*, and the petition prayed that a proper person might be appointed in the place of the heir-at-law of *Charles Dilly* to convey the legal estate in the premises to the petitioner.

Mr.

1836.

Ex parte WHITTON.

Mr. *Pemberton* and Mr. *Loftus Wigram*, for the petitioner, referred to *Ex parte Payne* (*a*), where the Vice-Chancellor had certainly expressed an opinion that the eighth section of the 1 *W.* 4. *c.* 60. did not apply to the case of a mortgagee, or heir of a mortgagee; and, if that were so, no order could be made upon this petition. The Vice-Chancellor, in his judgment, said, "Mr. *Jemmett*, in his second edition* of Sir *Edward Sugden's Acts*, makes this observation on the reporter's note to the case of *In re Goddard*. 'The reporter, in a note to the above decision, adds, "the case in question seems to be *casus omissus* in the act:" but this is not so; the case of a mortgagee was intentionally distinguished, in this respect, from that of a mere trustee by the framer of the act, and was purposely omitted from the operation of this section through fear of the mischiefs that might occur by too hastily disposing of the interest of mortgagees, under the idea of their being merely trustees.'" The Vice-Chancellor proceeded to observe, that if any case were wanting to illustrate

(*a*) 6 *Sim.* 645.

* The Reporter, in the note to the case *In re Goddard*, did not, as is supposed, suggest that the case of a *mortgagee* was *casus omissus* in the act, but that the case of an unknown heir of a mortgagee, who, upon payment of the mortgage-money, would be a *trustee* for the mortgagor, was, for the reasons mentioned, unprovided for by the act. The subsequent act removes the difficulty, apparently at the expense of the intention of the framer of the prior act. Sir *E. Sugden*, however, has himself decided that the eighth section does not in a clear case *exclude* a mortgagee from its operation, *Prendergast* v. *Eyre*, *Lloyd & Goold*, 11.; and Mr. *Jemmett*, in the observations referred to by the Vice-Chancellor, cites the very act which shews that the legislature, to whose declaration of its own meaning even the intention of the framer of an act must yield, meant to *include* mortgagees in the eighth section, which provides for conveyances where the heir is unknown.

1836.

Ex parte WHITTON.

illustrate the object which Sir *E. Sugden* had in view when he framed the eighth section of the act, the case before the Court would have illustrated it. That was the case of a devisee of a mortgage who had some beneficial interest in the mortgage, and who, consequently, was not a trustee within the meaning of the act. But it was clear that the eighth section did apply to the case of a mortgagee, for, whatever might have been the intention of the framer of the act, the legislature, which was the best interpreter of its own intentions, had declared its meaning in the 4 & 5 *W.* 4. *c.* 23. *s.* 2. *, which, assuming that the eighth section of the prior act applied to mortgagees as well as to trustees, and that the heir of a mortgagee who was not known was included in that section, made the like provision in the case of a mortgagee who died without an heir. If the Court should be of that opinion, the petitioner was entitled to the usual order referring it to the Master to ascertain whether the heir of the mortgagee was unknown, and was a trustee within the meaning of the act.

The MASTER *of the* ROLLS was of opinion that mortgagees and the heirs of mortgagees were within the eighth section, explained by the subsequent act, and made the order.

* "And be it enacted, that where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the 11 *G.* 4. & 1 *W.* 4. intituled, *An Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling courts of equity to give effect to their decrees and orders in certain cases*, in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir."

REPORTS

OF

CASES

ARGUED AND DETERMINED

1836.

IN

THE ROLLS COURT.

FOSTER *v.* HARGREAVES.

1836.
March 23, 24.
April 19.

A. by deed assigned certain sums presented by a fund in Court to *B.*, in trust to apply the same in payment and discharge

IN the month of *January* 1812, *George Ridge* was one of the partners in the banking house of *Cocks*, *Biddulph* and *Co.*, and was also a customer of the house. On the 15th of *January* in that year *George Ridge* transferred the sum of 3000*l.* from his separate cash account with

of money then due from *A.* to *B.*, and in further payment of all and every the sums of money which *B.* might advance to *A.*; and, subject thereto, in trust for *A.* *A.* died indebted to *B.* in the sum of 3000*l.* due at the date of the assignment, and also largely indebted to the Crown. *A.* was further indebted to a banking firm, of which *B.* was a partner, in a sum which was treated by the partnership as a bad debt, and in respect of which *B.*'s share of the loss amounted to 3914*l.*; and a further sum of 2313*l.* was paid after the death of *B.* by his executor to the Crown, upon process being issued against the estate of *B.*, who had been a surety to the Crown for *A.*

The Crown claimed priority as to the whole fund in Court, insisting that the property comprised in the deed consisted of *choses in action*, and that no notice had been given to the trustees of the fund.

Held, that the estate of *B.* was entitled to the benefit of the deed in respect of the sum due at the date of it, and the sum paid by *A.*'s executor, but not to the sum representing *B.*'s share of the loss in the partnership transaction.

1836.

FOSTER v. HARGREAVES.

with the firm to the account of his son *John Holman Ridge*, who drew it out for his own use.

By this transaction *John Holman Ridge* became indebted to *George Ridge*, and on the 20th of *February* 1812, an indenture was executed by and between *John Holman Ridge* of the one part, and *George Ridge* of the other part, whereby *John Holman Ridge* assigned to *George Ridge* his right to a sum of 10,000*l.* and certain other property represented by a fund in Court, to hold the 10,000*l.* and other property in trust, that *George Ridge* should first deduct his costs, and in the next place should retain and apply the residue, as far as the same would extend, in payment and discharge of the money then due from *John Holman Ridge* to *George Ridge* with interest, and also in further payment of all and every other sums of money which *George Ridge* should or might advance or pay to or for the use of *John Holman Ridge* with interest, and subject to those trusts in trust for *John Holman Ridge*.

John Holman Ridge died in *August* 1816. At the time of his death he was indebted to his father in the before-mentioned sum of 3000*l.* and interest thereon from the day of the advance. He was indebted to the banking house of *Cocks*, *Biddulph* and *Co.* (in which his father was a partner), in the sum of 15,657*l.* 8*s.* 11*d.*, which was secured by a bond. He was also largely indebted to the Crown, and, in respect to the Crown debt, *George Ridge* was liable to a considerable extent under bonds which he had executed in the years 1802 and 1803 as one of the sureties for his son.

In *January* 1817 *Cocks*, *Biddulph* and *Co.* treated the debt of 15,657*l.* 8*s.* 11*d.*, due from the estate of *John Holman Ridge* as a bad debt; and they placed it as such to the debit of the capital, and profit and loss account of

1836.

FOSTER v. HARGREAVES.

of the partners; and each partner's share of the aggregate loss, including this particular loss, being set off against his capital and interest in the concern, *George Ridge*, who was partner for a fourth share, had in effect to bear the loss of 3914*l.* 7*s.* 2*d.*, being one-fourth of the debt of 15,657*l.* 8*s.* 11*d.*

George Ridge died in *October* 1824, and in *February* 1826 the Crown issued process against his executor, to enforce his liability upon the bonds, by which he had become one of the sureties for his son; and in consequence of this proceeding, the executor of *George Ridge* paid to the Crown two several sums of money, *viz.* 2000*l.* on the 14th of *October* 1828, and 313*l.* 11*s.* 8*d.* on the 10th of *April* 1829.

Before either of these sums was actually paid, and on the 9th of *June* 1827, an inquisition under a writ of *diem clausit extremum* was taken, and by the inquisition, after finding certain particulars relating to a debt due from Lord *Crewe* to *John Holman Ridge*, and the securities for the same, (being in fact the property comprised in the indenture of the 20th of *February* 1812). it was stated that *George Cooper Ridge*, the executor of *George Ridge*, claimed all such benefit as he was entitled to under the same indenture, and the sheriff returned that he had seized and taken the property into the hands of his Majesty.

By an order in the cause, dated the 20th of *November* 1834, it was referred to the Master to inquire whether the executor of *George Ridge*, or any and what other person was entitled to or beneficially interested in the fund in question under any deed or other security; and the Master was to state priorities, and take an account of what was due.

1836.

FOSTER v. HARGREAVES.

The *Attorney-General* claimed the fund, free from any claim on the part of the executor of *George Ridge*; and the executor claimed the benefit of the deed of the 20th of *February* 1812 as a security, first, for the 3000*l.* advanced on the 15th of *January* 1812 and interest; secondly, for the 3914*l.* 7*s.* 2*d.*, the loss which *George Ridge* sustained by reason of *John Holman Ridge's* debt to *Cocks*, *Biddulph* and *Co.* proving bad; and thirdly, for the sums of 2000*l.* and 313*l.* 11*s.* 8*d.*, paid to the Crown by the executor of *George Ridge* in respect of his liability under the surety bonds.

The Master reported in favour of the executor of *George Ridge* on all points, and the case now came on upon a petition of the executor to confirm the report, and a cross-petition of the *Attorney-General*, and a nominee of the Crown raising objections to the report, and praying that it might not be confirmed.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Koe*, in support of the petition, contended that the sum of 3000*l.* advanced by *George Ridge*, the father, and the sums of 2000*l.* and 223*l.* paid by the petitioner in respect of the liability of *George Ridge* as a surety for his son were clearly debts secured to the estate of *George Ridge*, the father, under the assignment of *February* 1812. It had been held that the Crown might take goods under an extent after they had been seized by the sheriff but not sold, because the property continued in the debtor until sale, and the seizure by the officer of the law was for the benefit of those who were by law entitled, *Giles* v. *Grover* (*a*); but the Crown could not avoid an equitable mortgage, *Casberd* v. *The Attorney-General* (*b*); or a *bonâ fide* assignment in trust for creditors: *The King*

(*a*) 9 *Bing.* 128. (*b*) 6 *Price*, 411.

1836.

FOSTER v. HARGREAVES.

King v. *Watson*. (*a*) The Master was undoubtedly right, therefore, in finding as to the sums of 3000*l.* and 2313*l.*, that the extent of the Crown could not prevail against the equitable assignment of the fund now in Court, made by *John Holman Ridge* to secure to his father the debts advanced by him at the date of the assignment, and all sums thereafter to be advanced. The sum representing the loss sustained by *George Ridge*, the father, in respect of the debt due from the son to the partnership, was also substantially a debt due from the son to the estate of the father, and the Master had properly found that the Crown had no claim to priority over the petitioner in respect to that sum, but that it was equally secured by the assignment of *February* 1812. *John Holman Ridge* could not himself have claimed the fund in Court, without satisfying the proportion of the loss sustained by his father in the partnership transaction; and the Crown could not be in a better situation than *John Holman Ridge*, but could only be entitled to the fund subject to all the equities which attached upon it.

The *Solicitor-General* and Mr. *Wray*, *contrà*, argued that as to the first claim on the part of the petitioner to the sum of 3000*l.*, the property, comprised in the deed of assignment, consisted of *choses in action*; that no notice of the assignment had been given to the trustees who had the legal estate in the fund, and that the Crown was therefore by reason of its superior diligence, and not by force of its prerogative, entitled to priority, as any individual would have been entitled, upon the principle established in the cases of *Dearle* v. *Hall* (*b*), and *Loveridge* v. *Cooper* (*c*). The same principle applied to the other claims of the petitioner; but there were also other special

(*a*) *West on Extents*, 115.
(*b*) 3 *Russ.* 1.
(*c*) 3 *Russ.* 30.

1836.

FOSTER v. HARGREAVES.

special grounds upon which the Crown was entitled to priority in respect of those claims. It was impossible to maintain that the sum attributed to *George Ridge* the father, as the amount of loss sustained by him in the partnership transactions with the son, was either a sum due and owing to the father at the date of the assignment, or a sum advanced and paid by him after the assignment. That sum was the balance of loss occasioned by partnership transactions, and not a sum of money advanced or paid by the father on account of the son. The event contemplated and provided for in the trust deed, namely, the advance or payment of a sum of money by the father to or for the use of the son, did not happen; for no separate advance was made by the father, and consequently the trust never arose. As to the sums of 2000*l.* and 223*l.* it could not possibly be successfully contended that the petitioner was entitled to any priority as against the Crown, which, in respect of those sums, had proceeded against the petitioner in his character of representative of a surety, liable upon the bonds given to the Crown.

Mr. *Pemberton*, in reply, said the doctrine laid down in *Dearle* v. *Hall* and *Loveridge* v. *Cooper* had no application, because here there was a pending suit, which was itself abundant notice of the assignment. The effect of the transaction between the partners after the death of *Ridge*, the son, was to make the proportion of the loss attributed to *Ridge*, the father, a separate debt owing to him from the estate of the son, and to bring it within the very terms of the assignment. As to the sums paid in respect of the surety bonds given by *Ridge*, the father, the Crown, which stood in the place of the son so far as its claim to this fund was concerned, was clearly bound by all the equities to which the son's estate was liable.

The

The MASTER *of the* ROLLS.

1836.

FOSTER v. HARGREAVES.

April 19.

In the petition of the Attorney-General all the claims of the executor are objected to upon the ground that the property, comprised in the deed, consisted of *choses in action*, and no notice, as it is alleged, was given to the trustees by whom the funds were held or ought to have been realised; and the two last claims are objected to on grounds peculiar to themselves. Upon a consideration of the circumstances of this case, I think that the doctrine of notice, as established by the cases of *Loveridge* v. *Cooper*, and *Dearle* v. *Hall* (*a*), is not applicable, and, there being no other objection to the claim of the 3000*l.* and interest, I am of opinion that the Master's report in that respect must be confirmed.

As to the 3914*l.* 7*s.* 2*d.* it is clear that, so far as that claim is concerned, *John Holman Ridge* never contracted any debt to *George Ridge* separately. His dealing with the firm began before the date of the deed of the 20th of *February* 1812; the very debt thereby principally secured was a debt which had become due to *George Ridge* by a transfer in the partnership books, and by *John Holman Ridge* availing himself of it. The debt contemporaneously due to the partners was secured by a distinct and separate bond, and I cannot construe the deed in such a way as to make it a security for what might become due from *John Holman Ridge* to the partners; and considering that this debt was due to the partners alone, so long as *John Holman Ridge* lived, I do not think that the mode in which the partners, after his death, thought fit to deal with the debt amongst themselves could alter the right which any of them had against his estate. Upon the whole, it appears to me that

(*a*) 3 *Russ.* 1. 30.

1836.

FOSTER v. HARGREAVES.

that the Master has erroneously found the 3914*l.* 7*s.* 2*d.* and the interest thereon to be a charge on the fund in court.

As to the sums of 2000*l.* and 313*l.* 11*s.* 8*d.*, at the date of the deed, at the death of *John Holman Ridge*, and at the time of his own death, *George Ridge* was liable to pay these sums on account of *John Holman Ridge*. If he had paid them, they would have been payments made to the use of *John Holman Ridge*, and would clearly have been secured by the deed. At last they were paid by the executor to the Crown in discharge *pro tanto* of *John Holman Ridge*'s debt under compulsory process, which had issued and was in force before the inquisition. I think that a Court of equity would not at any time have permitted *John Holman Ridge* to redeem his interest in this fund without relieving *George Ridge* from the liability on his bonds, and I am of opinion that in this respect the Master's report is right.

Confirm the report as to the 3000*l.*, 2000*l.* and 313*l.* 11*s.* 8*d.* and the interest thereon respectively.

Allow the objection as to the 3914*l.* 7*s.* 2*d.* and interest.

Compute subsequent interest on the sums as to which the report is confirmed, and sell so much of the fund in court, (16,926*l.* 18*s.* 3*d.* bank 3 per cent annuities), as will be sufficient to pay the same, and transfer the remainder to Mr. *Maule* as nominee on behalf of his Majesty.

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

March 29.
April 16.

In a charter incorporating a charitable foundation under the name of the master and five poor of the college or hospital therein described, it was provided that the master should perform certain ecclesiastical duties either by himself or by some sufficient minister or curate. The master of the hospital did not reside in or near the hospital, and a scheme had been approved, upon a reference, by which the master of the hospital was to allow a salary to a curate, who was to reside in the hospital:

Held, upon the construction of the whole charter, that the master was bound to reside in the hospital for the purpose of performing the several duties of his office.

Whether ecclesiastical duties enjoined under a charitable foundation are properly performed, it is not within the jurisdiction of the Court to determine, this being a matter which belongs to the cognisance of the ecclesiastical authorities.

BY letters patent dated the 9th of *October* in the eighth year of the reign of King *James* the First, reciting that a certain college or hospital was then lately discovered to have been founded in the suburbs of the town of *Colchester* by *Eudo Dapifer*, formerly seneschal of King *Henry* the First, called the Hospital of *St. Mary Magdalen* in the suburbs of the town of *Colchester* for the habitation of lepers and infirm persons, for whose relief and support in those parts as well the said *Eudo Dapifer*, as different Kings of *England* and others had granted or piously intended to grant certain manors, lands, tenements, &c., and reciting that his Majesty was given to understand that the said college or hospital was then in decay, and that the chapel of the college was in total ruins, and that the lands and possessions of the college were in great measure dissipated and alienated, and unjustly diverted from the said pious uses, from which cause the poor of the college were not relieved nor supported according to the intention of the founders and benefactors thereof; and reciting that his Majesty, as well for the care which he had for the support, relief, and maintenance of the poor of his kingdom, as from his wish to perform all offices of charity, was desirous to provide for the foundation of the said college or hospital, called the Hospital of *St. Mary Magdalen* in the suburbs of the town of *Colchester*, and for the perpetual

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

petual support thereof, and of the master and poor who should exist and be maintained in the same; and that the manors and possessions which had been given to the college should be converted to pious uses according to the intention of the founder; it was ordained that from thenceforth and for ever there should be one college or hospital of the poor in the suburbs of the town of *Colchester* for the relief and sustenance of the poor, to be thenceforth called the college or hospital of King *James*, and that it should consist for ever of one master and five poor. And in order that his Majesty's intention might better take effect, and that the goods, lands, tenements, incomes, &c. granted for the support of the college might be better governed and expended for the preservation of the same and for the support and maintenance of the master and poor, it was moreover ordained that thenceforth and for ever there should be one master of the said college or hospital and of the possessions thereof, and he should have the cure of the souls of the parishioners of *St. Mary Magdalen* in the town of *Colchester*, and he should there celebrate divine service; he should faithfully preach the word of God, and he should administer the sacrament in due manner either by himself, or by some sufficient minister or curate. And further, that there should be five poor persons who alone, either men or women, should be supported, relieved, and maintained in the college, and that they should be called the poor of the college or hospital of King *James* in the suburbs of the town of *Colchester*; and for their support, relief, and maintenance they should have, enjoy, and receive, and each of them should have, enjoy, and receive, through the hands of the master of the college for the time being, or of his assigns, annually 52*s.*, which should be paid by the master, or by his assigns, in quarterly payments of 13*s.* at the four usual feasts. And his Majesty did thereby appoint

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

point *Henry Davye* one of his chaplains to be the master of the college and of all the lands and goods thereof, commanding that the same *Henry Davye*, as long as he should remain in the office of master, should celebrate divine service, preach the word of God and administer the sacrament either by himself or by a sufficient deputy, as well to the poor of the college as to the parishioners of *St. Mary Magdalen* in the parish church of *St. Mary Magdalen* adjoining the said college. And his Majesty also appointed certain persons to be the first poor of the college to continue therein during their lives, unless for any reasonable cause any of them should be removed by the master for the time being according to the statutes and ordinances of the college as often as the case required. And when any of the five poor should die or be removed, power was given to the master to appoint others in their places, and the master and poor were thereby created a body corporate by the name of the master and poor of the college or hospital of King *James*. And it was further ordained that the Chancellor of *England* should be visitor of the college; and his Majesty granted to the master for the time being full power, together with the assent of the Attorney-General and Solicitor-General or either of them, to make statutes and ordinances touching the government, election, expulsion, punishment, order, and direction of the master and poor, and to appoint any other things whatsoever, touching the college and the ordering and disposal of the goods and possessions thereof. And it was thereby enjoined that all the income of the possessions, that had been formerly and should be thereafter given for the support and maintenance of the college, should be disposed of and expended for the support of the master and poor for the time being, and for the support, maintenance, and repairs of the houses, tenements,

1836.

ATTORNEY-GENERAL v. SMITHIES.

ments, and possessions of the college, according to the statutes, and to no other uses, intents, or purposes.

The rents of the estates belonging to the hospital had increased to 245*l.* a year. The sum of 52*s.* was annually distributed to each of the five poor persons, and the remainder of the rents was received by the master. The object of the information was to have an increased allowance made to the five poor persons out of the increased rents, and it prayed for a reference to the Master to approve of a proper scheme, as well for that purpose as for the general regulation of the charity. The information was heard before the Master of the Rolls (Sir *John Leach*) on the 18th of *November* 1831, when his Honor made the following decree: "It appearing to have been the general intent of the letters patent, that the annual allowance to be made to the five poor persons should be sufficient for their maintenance, even if incapable of labour; and it being provided by the letters patent that the master of the hospital, together with the Attorney and Solicitor-General for the time being, should have power to make statutes for the disposition of the revenues of the charity; his Honor doth declare, that notwithstanding the particular intent expressed in the letters patent as to the 52*s.* a year, which must have prevailed in case there had been no increase of the revenues of the charity, the master of the hospital is not entitled to the whole income of the charity property, subject only to the annual payment of the 52*s.* yearly to each of the five poor persons." And it was ordered that the accounts and inquiries therein mentioned should be taken and made, and that it should be referred to the master to approve of a scheme for the due regulation of the charity and the management of the estates belonging thereto, and for applying the rents and profits, regard being had to the annual

annual value thereof, for the support and maintenance of the master of the hospital and the five poor persons.

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

The Defendant, Mr. *Smithies*, presented a petition of rehearing to the Lord Chancellor, which came on to be heard on the 29th of *January* 1833 before Lord *Brougham* *, who was of opinion that the master of the hospital was entitled to the whole revenues of the hospital, subject to the payment of 52*s.* annually to each of the five poor; and he accordingly varied the decree of the Master of the Rolls by directing the omission of those parts of the decree in which the right of the five poor persons to any increased allowance was declared or recognised, the reference to the Master to settle a scheme, subject to such omissions, being retained.

In pursuance of the order made on the petition of appeal, the Master made his report, dated the 9th of *February* 1835, by which, among other things, he approved of a scheme, the fifth article of which was as follows: —

"That the master for the time being, in case of his being non-resident or incapable of performing the ecclesiastical duties directed by the charter, shall duly appoint and maintain a sufficient curate for the performance of the said duties, who shall reside there, and that the said master shall allow and pay to such curate the yearly salary or stipend of 75*l.*, at the least, by half-yearly payments."

On the cause coming on for further directions, the Master of the Rolls (Lord *Langdale*) expressed a doubt, whether the fifth article of the scheme, sanctioning the non-

March 29.

* Lord *Brougham*'s judgment is annexed to this case, p. 300.

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

non-residence of the master, was not inconsistent with the provisions of the charter, and his Lordship directed that point to be spoken to.

April 16. On a subsequent day Mr *Pemberton*, Mr. *Wray*, and Mr. *O. Anderdon*, for the relators, contended that it was inconsistent with the provisions of the charter and with the existing statutes and ordinances, that the master should be permitted to reside in a distant county, and perform all the duties of his office by a deputy. The charter provided that the master should have the cure of the souls of the parishioners of *St. Mary Magdalen* in *Colchester*, and that he should celebrate divine service, and administer the sacrament in the parish church of *St. Mary Magdalen*, which adjoined the hospital, either by himself or by some sufficient minister or curate. The master might have occasional assistance if he were prevented from performing the ecclesiastical duties attached to the office by sickness or other just cause; but it was contrary to the plain intent of the charter, that he should be at liberty to absent himself altogether from the duties of the office, reside in a distant county, and never appear at *Colchester* but for the purpose of receiving the whole revenues of the charity property, except the pittance of thirteen shillings a quarter to each of the five objects of the charity, which, according to the decree made upon the appeal, was all the master was liable to pay for the maintenance of the five poor, and the satisfaction of the pious uses contemplated by the founder.

It had been suggested, that the duties in question were of an ecclesiastical nature, and that this Court had no jurisdiction

jurisdiction to enforce the performance of spiritual duties *; but it was immaterial in this case, whether the duties were of a spiritual or secular nature, for there was here an express trust created by the charter for the performance of them, and where there was a trust this Court had undoubtedly jurisdiction to enforce the performance of it. The Court was, therefore, bound to reject the fifth article of the scheme, and to require the residence of the master of the hospital, and, if necessary, direct a suitable residence to be provided for him.

Mr. *Tinney*, Mr. *Spence*, and Mr. *Rudall*, *contrà*, insisted that the Court of Chancery had no power to control the conduct of the master, which was subject only to the supervision of the Lord Chancellor in his visitatorial capacity. Suppose the Court ordered the master to reside in the hospital, and the master refused to obey; how could the Court enforce obedience to its order? Could it commit the master to the Fleet? The Court had no means of compelling obedience to the exercise of an authority which did not legitimately belong to it, and which the visitor alone had the right to use and enforce. The limits of the Court's jurisdiction in this respect were established by the cases of *The Attorney-General* v. *Middleton* (*a*), and *The Berkhampstead School case* (*b*). In the former case Lord *Hardwicke* said that, though he was not a judge disposed to extend visitatorial powers, yet, where there was a charter with proper powers, there was no ground to come into this Court to establish a charity, and it must be left to be regulated

* See *The Attorney-General* v. *Crook*, *suprà*, p. 121.

(*a*) 2 *Ves.* sen. 327. (*b*) 2 *V. & B.* 134.

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

lated in the manner the charter had directed. And in the case of the *Berkhampstead School*, which was a royal foundation, where the master and usher were corporators, and this very point of non-residence came under discussion, Lord *Eldon* disclaimed all jurisdiction in a visitatorial capacity, and said that so long as the master and usher remained corporators, and the visitor did not think proper to remove them, they must, in a court of justice, have the enjoyment of all the revenues which belonged to them by the same instrument which gave them the corporate character. That case was in no respect distinguishable from the present. By the express terms of the charter the master was authorised to employ a curate or deputy; there was at present no habitation for the master, and if, by the terms of the charter, he might act by a deputy, where was the necessity or advantage of enforcing the master's residence in or near the hospital? If Mr. *Smithies* did not perform his duties as master of the hospital, it belonged to the visitor to correct him, and the Court had no power to oust the jurisdiction of the visitor.

Mr. *Pemberton*, in reply, insisted that there never was a case in which principles of law had been urged in support of conclusions so directly repugnant to justice and common sense. Here was a charity the objects of which were, according to the express terms of the charter, the support and maintenance of the master and five poor, the moving cause for the King's grant of his letters patent being the care which his Majesty had for the support, relief, and maintenance of the poor of his kingdom; and yet it had been held upon appeal that, notwithstanding the great increase of the rents, and the difference in the value of money, the five poor were entitled only to receive, respectively, the same

1836.

ATTORNEY GENERAL v. SMITHIES.

same 52*s.* which they received in the reign of *James* I., and the master, after paying that allowance, was to take to himself the whole residue of the income. In that decision he was bound to acquiesce; but what was the nature of the scheme which the Court was now called upon to confirm by its sanction? The question of the Defendant's rights in respect to the property of the charity being disposed of, it was referred to the master to settle a scheme for the regulation of the charity, comprising, among other things, the due performance of the various duties, ecclesiastical as well as temporal, which by the terms of the charter the master of the hospital was bound to perform. The Master had approved of a scheme by which the Defendant was exempted from the performance of any duty; he was to pay a curate 75*l.* a year for the performance of the ecclesiastical duties, and after payment of that sum, and 52*s.* annually to each of the five poor men for their support and maintenance, he was to reside in *Herefordshire*, and put the whole amount of the revenues of the charity into his own pocket? And this monstrous abuse and perversion of a gift devoted to purposes of charity, the Court, it was argued, had no power to correct or prevent, because the master was a corporator under a royal charter, and his misconduct or neglect of duty was only amenable to the jurisdiction of the visitor, as if, in a great proportion of cases, charities were not established by charter, and as if, wherever a trust was created, this Court had not a clear jurisdiction to enforce the performance of that trust. The charter enjoined that the revenues of the college should be expended for the support and maintenance of the master and poor for the time being, and for the maintenance and repairs of the houses, and possessions of the college; and those trusts, as well as the various duties which the master was required to perform, were inconsistent with his residence

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

in the county of *Hereford*. If there was, at present, no fit habitation for the master, a suitable residence should be provided for him.

The MASTER *of the* ROLLS.

It does not fall within the jurisdiction of this Court to determine, whether ecclesiastical duties, enjoined under a charitable foundation, are properly performed. That is a matter of which the ecclesiastical authorities will take cognisance. But in settling a scheme for the regulation of such a charity, the Court must at least take care that the person by whom the ecclesiastical duties ought to be performed, is in such a situation that he may perform them.

This was a reference to the master to approve of a scheme for the regulation of the charity, and for the management of the estates belonging thereto. What the master has done is to approve of a scheme by which the master is restrained from felling timber; empowered to make leases, and ordered to make no sale, exchange, or other alteration, save such leases, of any of the lands of the hospital. Provision is made for the appropriation of a sum of 4754*l.* stock transferred into Court. The fifth article provides that, if the master of the hospital shall be non-resident, he shall duly appoint and maintain a curate who shall reside. With the exception of this provision, the whole scheme relates to the management and appropriation of the property only, and under these circumstances, I think that the master has not sufficiently provided for the regulation of the charity.

It is obvious that, if non-residence be permitted, the master of the hospital may at his option exempt himself from

1836.

ATTORNEY-GENERAL v. SMITHIES.

from all personal attention to the discharge of his duties. That this was not intended appears by an examination of the charter, by which he is to have a residence in the college, and is required personally to perform several duties. There is, indeed, a provision that those duties may be performed by deputy, and it was fit to make arrangements for occasional or accidental interruptions of the personal discharge of the duties, but it cannot be reasonably inferred from that provision that the master of the hospital was to be at liberty to reside permanently at a distance, and transfer the personal performance of the duty wholly from himself to a deputy. The revenues of the college are to be expended for the support and maintenance of the master and poor for the time being, and for the maintenance and repair of the houses, tenements, and possessions of the college according to the statutes, and the statutes made contemporaneously with or soon after the date of the charter require the master to maintain the rights and privileges of the college, and to maintain all buildings and houses so as to be fit and convenient for the habitation of the master and poor. There ought, therefore, to be a habitation for the master; and looking at the whole charter and statutes, it was clearly intended that the master should reside there. It is said that there is not now any habitation for the master: I do not know how this may be, but the scheme provides that the curate shall reside there, and I must infer that there is a habitation which is thought fit for him, whether it is fit for the master or not.

Under all the circumstances, it appears to me that the declaration which I ought to make is, that, according to the true construction of the charter, the master of the college or hospital ought to reside in such college or hospital for the purpose of discharging the

1836.
ATTORNEY-GENERAL. v. SMITHIES.
1833. *Jan.* 29.

several duties of his office. And let it be referred to the Master to inquire whether there is a fit residence in the college or hospital for such master; and, if the Master should find that there is not, let it be declared that such residence ought to be provided; and let the Master review the scheme set forth in his report with reference to this declaration.

This decision was appealed from, and affirmed by the Lord Chancellor, on the 28th of *November*, with some variation in the terms of the order, the effect of which was to give liberty to the master to reside in the neighbourhood of the hospital.

LORD CHANCELLOR BROUGHAM.

The intention of the endowment is stated to be for the relief and sustentation of the college or hospital, and of the master and poor who should exist and be maintained in the same; and the charter then goes on to give effect to this intention in the following manner. There is to be a college or hospital for ever, consisting of one master and five paupers. There is to be a master of the hospital, and of the goods and lands thereof, and there are to be five paupers supported, relieved, and maintained in the hospital, and they are to be supported thus. For their support, relief, and maintenance, they are to have and receive, each of them, through the hands of the master, 52*s*. to be paid by the said master at the four usual feasts. And they are incorporated by the name of, "The Master and Poor of the College or Hospital of King *James*." And after giving power to make bye-laws, with the assent of the Attorney and Solicitor-General, for the order and disposition of the charity estates, the endowment concludes by directing that the whole of the estates shall go to the support of the master and poor, and the maintaining and repairing of the house and possessions, and no otherwise.

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There being, then, no dispute that the whole is given to the charity, the question is, whether the estate is given to the body, consisting of master and almsmen, subject to a payment of *52s.* to each of the almsmen, or to the master and almsmen; in other words, whether the surplus shall go to the master, whose share is not fixed, or between him and the almsmen, notwithstanding that there appears an intent to fix and limit the shares of the almsmen.

Let us first ask (as it is always right to do where no fixed rule of law prevails,) what is the plain and natural sense of such a gift? If I give the whole of an estate and other funds to several objects, and mention the proportions in which each shall take, no difficulty arises; they are to divide the whole in those proportions. So if, without expressly stating that it shall be so divided, I so frame the gift that no reasonable doubt can be entertained of such being my intention, it is the same thing. One most important indication of this intention is, when particular amounts are given to the different objects, and the whole shares taken together exhaust the fund. This is in fact the *Thetford* school case, in 8 *Co.* 131, supposing that the gift had been directly to the objects of the donor's bounty, and no feoffees had been interposed. For, as that case stands, a question in later times — had the case been more recently decided — might have arisen as to a resulting trust. This at least was Lord *Hardwicke*'s, and appears to have been Lord *Erskine*'s opinion. But suppose the gift to be framed quite otherwise, and instead of expressly apportioning the whole, or impliedly apportioning it as by exhaustion, or other indication of such an intention, I give the fund entirely to one body, subject to a certain payment to other parties, these can only take what is given as a charge, and the surplus must go to the donee of the fund, unless there be circumstances clearly indicating a contrary intention. Nor is there any particular form in which alone the one object of the donor's bounty can be made the primary or principal donee, and the other only the secondary donee, or, as it were, the incumbrancer upon the fund. If the gift is of the whole entire fund to one, and the other is to receive so much a year out of the rents or profits, that clearly gives the surplus to the first. Then if the gift is to both, but so as one shall take yearly so

1836.

ATTORNEY-GENERAL v. SMITHIES.

much, is it not this in substance and effect the same thing? The whole is given to both, not in fixed proportions, but with a certain amount to the one, and the unascertained residue to the other. It is distributed, and their shares are ascertained, not by division, but subtraction. Now if you examine all the cases, both those to which I shall presently refer, and the others which are well known, those in *Ambler*, *Attorney-General* v. *Johnson* (*a*), and *Attorney-General* v. *Sparks* (*b*), that of *Attorney-General* v. *Mayor of Coventry* (*c*), and that of *Attorney-General* v. *Haberdashers' Company* (*d*), you will find nothing that militates against this plain and natural construction, but much that supports it. Yet the case I have put is, in substance, the case at bar; for the intention of the gift is for the relief and sustentation of the master and poor; and that intention is executed by erecting a college or hospital for the master and five paupers, the master to be trustee of the hospital, and of the goods, lands, &c. thereof, (which distinction further aids the argument in his behalf), and the five paupers to receive, for their support, relief, and maintenance 52*s.* each, through the hands of the master, and the funds are to go to the support of the master and paupers, and for repairs, and not otherwise. This certainly is, at the least, a gift of the whole to the master and paupers; the amount receivable by the latter being ascertained, that receivable by the former unascertained; in other words, the surplus being the master's, after paying the paupers and repairs. It is clear that there is no middle course between this construction and one which would give the paupers, first their fixed payment of so much a year, and then their share of the residue also.

The importance of the question, not only in itself, but in its possible consequences, as well as the circumstance of my having the misfortune to differ with his Honor, the Master of the Rolls, in the opinion which I have formed, induces me further to consider the authorities that are supposed to bear upon the subject. An examination of these tends greatly, I think, to confirm the view which I take.

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(*a*) p. 190.
(*b*) p. 201.
(*c*) 2 *Vern.* 397., and 7 *Bro. P. C.* 235.
(*d*) 4 *Bro. C. C.* 103.

1836.

ATTORNEY-GENERAL v. SMITHIES.

The *Thetford* school case (*a*) proceeded upon grounds which are very material to be considered here. It was a devise of lands to trustees for the maintenance of a preacher four days a year, a master and usher of a school, and certain poor; and certain sums were given to each, *i. e.* preacher, master, usher, and poor, in all 35*l.*, which formed the whole of the rents and profits of the land devised. The first consideration of the Court, therefore, was that, the whole being given to the objects of the donor's bounty, the increase of the rents and profits should be divided among them for that reason, and that the fixed payments specified should not limit the amount of the shares, though it might ascertain the proportions in which those shares were to be received by them. The circumstance which raised this argument is not to be found in the present case. For here, to one only of the objects, the alms-bodies a sum is fixed, and the donor contemplates a surplus over that, and disposes not of it. But the other, and according to the report, the principal reason of increasing the shares in the *Thetford* case applies to increasing the master's share, though certainly not the shares of the five paupers. Lord *Coke* says, "the resolution is grounded upon evident and apparent reason, for as, if the lands had decreased in value, the preacher, &c. should lose; so, when the lands increase in value *pari ratione* they shall gain." How is it here? If the rents fall down to 13*l.* the paupers have it all, and the master has nothing; therefore, by the argument in the *Thetford* case, he is entitled to the surplus, if any. Lord *Eldon* doubts if this be a sound principle, but he admits that the case in *Coke* has settled it as law, and that it cannot now be disturbed. In *The Attorney-General* v. *Mayor of Bristol* (*b*) Lord *Eldon*, after stating that no case has gone so far as to say that, if a gift of lands takes notice of the portion of the rents allotted to a charitable use being less than the whole rents, the charity is entitled to the surplus, and referring to the case of the *Attorney-General* v. *Arnold* (*c*), as shewing that a gift to *A.* for charitable purposes, and then of fixed sums to charities, but not amounting to the whole rents, makes *A.* a trustee of the surplus for charitable purposes, to be ascertained by sign manual,

(*a*) 8 *Co.* 131.
(*b*) 2 *J. & W.* 294.
(*c*) *Show. P. C.* 22.

1836.

ATTORNEY-GENERAL. *v.* SMITHIES.

manual, or by this Court, puts the case of *A.* being a charitable corporation, and asks might it not be argued that the gift to *A.* of the land, and certain payments to be made out of it would answer the intention, because one charity would take in land and another in money? I need hardly remark how very nearly the case here put by Lord *Eldon* approaches the present; indeed it is not distinguishable in principle. There can be no doubt that the opinion, intimated in the words I have just read, must have extended to the view I am taking of this case, and that Lord *Eldon* would, upon the same ground, have thus disposed of it.

But the whole of the case of the *Attorney-General* v. *Mayor of Bristol* is deserving of the greatest attention in disposing of the present case. It was a declaration of trust by gift of money to the corporation of *Bristol*, and a covenant by that corporation to purchase lands and pay certain sums to different corporate bodies in rotation, *Bristol* being one itself; and the question was, whether or not that corporation was a trustee of the surplus rents for those bodies. Lord *Eldon* delivered a most elaborate judgment — elaborate both as regarded the particulars of the case itself into every detail of which he very minutely went, and also as regarded the other cases — leaving nothing to regret, except that by some accident he had not looked at the report of the leading case, the *Thetford* school case, in Lord *Coke*. Yet even in dealing with the imperfect report in *Duke* on which his observations are grounded (and the imperfection relates only to an *obiter dictum*), he seizes with his wonted sagacity upon the error; for the difference of opinion, which he expresses in the form of a query or doubt, clearly applies to that portion of the case in which there is a discrepancy between the two reports. The whole of his reasoning and remarks are important in their bearing upon the present question; and his decision appears to me distinctly to support the view which I am now taking. He held that the corporation of *Bristol* was not a trustee of the surplus rents for the other corporations, upon the ground that *Bristol* was itself an object of the donor's bounty; and that the case fell within the range of those cases in which property is given to a corporate body, subject only to the charges imposed. Whoever reads the *Bristol* case attentively will perceive that there were

1836.

ATTORNEY-GENERAL v. SMITHIES.

were several matters in it opposed to this construction, which exist not in the present case; yet these matters, nevertheless, the Court got over.

I shall now take notice of a passage which has more than once been commented on in questions of this kind, and has been referred to upon the present occasion. In the *Thetford* case it was said that the resolution concerns the colleges in the universities and elsewhere "for in ancient times, when lands were of small yearly value (victuals being then cheap), and were given for the maintenance of poor scholars, &c. and that every scholar, &c. should have a penny or three-halfpence a day, that then such small allowance was competent, in respect of the price of victuals and the yearly value of the lands; and now, the price of victuals being increased, and with them the annual value of the lands, it would be now injurious to allow a poor scholar only a penny or three-halfpence, which cannot keep him, and to convert the residue to private uses, where, in right, the whole ought to be employed to the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed, and nothing to any private use; for every college is seised *in jure collegii, scilicet*, to the intent that the members of the college should take the benefit, and that nothing should be converted to private uses." The question in this case was between the objects of the charity, the master of the school, and the devisees. But the case of the colleges put by the judgment was, as stated in *Duke*, and as stated by Lord *Coke* himself, somewhat different, and as if a right were given to the scholars against the college. This at least appears to have struck Lord *Eldon* as an interpretation of the passage, for he says in *The Attorney-General* v. *Mayor of Bristol* (*a*), that, if the text is to be understood thus, that where property has been given to found a college, and a distribution has been made at the same time of all the rents to given members of the college, they must have an increase as the times require—of that there can be no doubt. But he adds that there are many cases to be found in both the universities where land has been given of greater value than the amount of the charges for scholars, &c., and the surplus

(*a*) 2 *J. & W.* 317.

1836.

ATTORNEY-GENERAL v. SMITHIES.

plus has been taken by the college itself; and that if this were considered an improper application of their funds, it would disturb the distribution of the revenues of many colleges in both universities. The report he cites is that in *Duke;* and the fuller one in Lord *Coke* makes it much more doubtful if any thing more was meant, than that the whole gift should go for public and collegiate purposes, private uses being repeatedly put in contrast with them, three times in Lord *Coke* and once in *Duke.* But there is a much more material difference between the two reports: that in *Duke* puts the case of lands given, not to the poor scholars, but to the college and scholars. "The case did concern all colleges, for when the lands were first given for their maintenance, and that every scholar should have a penny halfpenny a day." In Lord *Coke* it is land given to the scholars: "when lands were given for the maintenance of poor scholars, and that every scholar should have a penny or three halfpence a day." It is plainly a very different thing to say, that a gift of lands, or the rent of lands to maintain poor scholars, each having so much a day, is a gift to them of the whole, and entitles them to the surplus; and to say that a gift of land to a college for its maintenance, and that each scholar should have so much, entitles the scholar to the surplus *ultra* the fixed sum. The former is in truth exactly the *Thetford* school case; the latter is a case which has never been decided. The former is the plain and definite proposition that a gift of the whole fund, in fixed proportions, to different objects of the charity vests the whole in those objects in such proportions to the exclusion of the trustees through whose instrumentality the charitable purpose is to be effected. The latter is the position not to be maintained in argument, and for which certainly no authority can be cited, that the gift of a fund to certain parties, all alike objects of charity, and specifying what some shall take without mentioning the others in this respect, or establishing any proportion among them, entitles those whose shares are fixed to a share also of the residue. Had the words of Lord *Coke*'s report been accurately attended to, it never could have been supposed that this doctrine derived any countenance from it. But we may further observe that, even had it been as in *Duke,* and as commented on, and indeed *inter arguendum* and *obiter,* dissented from by Lord *Eldon,* it is no

no decision; it is only an *obiter dictum* agreeing with the barely possible bearing of the resolution in the case. The principal case itself, the *Thetford* school case, most clearly affords no countenance whatever to the doctrine.

It remains to consider whether there be any other circumstances connected with the present case, which call upon the Court to give a different construction to the grant. To speculate upon intentions which may be supposed to have existed, respecting the paupers, inconsistent with the precise and defined purpose intimated as to them in their relation to the master, or to the body of which they form a part, would be extremely unsafe, and could, indeed, lead to no satisfactory result. Such topics, on the one hand, are met and balanced by others of at least equal force and pertinency, as the station and functions of the master both in the hospital and in the church. But there is one particular which deserves much more attention, and appears to have greatly weighed with the Court below; the power given to make bye-laws, with the assent of the Attorney and Solicitor-General, for the ordering and disposing of the charity estates. I am of opinion, however, that this does not alter the position in which the case is left upon the construction of the rest of the instrument. First, because I take it that, in making such regulations, it must always be understood that they shall not be inconsistent with the body of the rules laid down originally in the governing charter, the letters patent themselves; but next and principally, because no such disposition as it is contended ought now to be made of the revenues has ever been made under the powers referred to, and therefore the question is, whether or not the parties can now be compelled to make it, or the Court can make it for them. They can only be compelled, if it be according to the intention of the donor; they would only be justified in making it, uncompelled, if the donor's provisions allowed them; but they could only be called upon by the Court to make it, if those provisions required them to do so. It therefore occurs to me, that this view of the question brings us back to the one just taken, and upon which the whole turns.

It is impossible, in cases of this description, to lay out of view the length of time during which a certain arrangement

1836.

ATTORNEY-GENERAL *v.* SMITHIES.

ment has subsisted, and a certain meaning been given in practice to the instrument of foundation. If, indeed, the practice, though of centuries, has been a breach of trust, doubtless the lapse of time should be no bar. But long adverse enjoyment is not to be thrown out of view in seeking for the true construction of the provisions, under which both conflicting parties claim; and a principle of distribution under a known instrument of foundation, if long acquiesced in by all the objects of the bounty from whence the funds proceed, and to effectuate the purposes of which the instrument is framed, ought not without manifest reason to be disturbed. The rule of interpretation from contemporaneous usage and long acquiescence extends over every branch of the law independently of its connection with matter of limitation and bar. I speak not now of a course of dealing with charitable funds in the absence of evidence respecting the original endowment, or in plain opposition to its provisions; but, where the endowment is forthcoming, its construction may be aided by adverting to the long and uninterrupted acting under it, and acquiescence in that acting.

It may be added, that in all such cases of contest between the different objects of the founder's bounty, the proof seems reasonably and naturally to rest on the party setting up a fixed and restricted portion as alone due to his companions in the charity, and claiming the surplus for himself. Exclusion may not be presumed even from usage, but the usage may be a confirmation of the evidence which the instrument offers, that the exclusion was intended.

1836.

CLEMENTSON *v.* GANDY.

April 27, 28.

ANN ELIZABETH SAVAGE, being possessed of large property to which she had become entitled under the will of her first husband *Thomas Ayliffe*, executed an indenture, dated the 30th of *September* 1816, and made between herself, of the first part, *George Crump*, and *William Robinson* (both since deceased), and the Plaintiffs, *Thomas Edward Michell Turton*, and *Richard Turton*, trustees, of the second part, and the Plaintiff, *John Clementson*, who was a near relation of *Thomas Ayliffe*, of the third part, by which she covenanted that her heirs, executors, or administrators should, at the end of six months after her decease, pay to the trustees the sum of 6000*l.* upon trust for the Plaintiff, *John Clemenston* his executors, administrators, and assigns.

In the year 1817, a marriage being in contemplation, (which afterwards took effect) between the Plaintiff, *John Clementson*, and a daughter of Sir *Thomas Turton*, an indenture of settlement was executed, dated the 27th of *October* in that year, and made between the Plaintiff, *John Clementson* of the first part, *Ann Elizabeth Savage* of the second part, Sir *Thomas Turton* of the third part, the intended wife, of the fourth part, and *Thomas E. M. Turton*, and *Richard Boodle* of the fifth part, by which, after reciting the effect of the indenture of the 30th of *September* 1816, and that *Ann Elizabeth Savage* had, in consideration of the said indenture having been delivered up to her to be cancelled, and in consideration of the intended marriage, transferred into the names

Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property, in which she had only a life-interest, to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible.

1836.

CLEMENTSON v. GANDY.

names of herself, *Thomas E. M. Turton*, and *Richard Boodle* the sum of 9682*l.* 6*s.* 3 per cent. consolidated Bank annuities, it was agreed and declared that they, the said *Ann Elizabeth Savage*, *Thomas E. M. Turton*, and *Richard Boodle*, should stand possessed of the said sum of 9682*l.* 6*s.* stock, upon trust for *Ann Elizabeth Savage* to receive the interest and dividends for her life, and after her decease upon trust for the benefit of the Plaintiff, *John Clementson* and his intended wife, and the children of the marriage as therein mentioned.

The indenture of the 30th of *September* 1816 was recited in the last-mentioned indenture, as bearing date the 30th of *December* 1816.

Ann Elizabeth Savage made her will, dated the 23d of *October* 1832, which contained the following clause: — "I do hereby ratify and confirm a certain indenture bearing date the 30th day of *December* 1816, made between me, *Ann Elizabeth Savage* of the first part, and *George Crump*, *William Robinson*, *Thomas Edward Michell Turton* of the second part, and *John Clementson* of the third part, whereby I have covenanted with the said *George Crump*, *William Robinson*, *Thomas Edward Michell Turton*, and *Richard Turton*, that my heirs, executors or administrators shall pay unto them, and the survivors or survivor of them, his heirs, executors, or assigns, at the end of twelve calendar months from my decease, the sum of 6000*l.* in trust for the said *John Clementson* his executors, administrators, and assigns. And I direct my executors to pay the said sum of 6000*l.* according to the tenor, true intent and meaning of the said deed of covenant." And the testatrix gave and devised all her freehold, copyhold, and leasehold estates to *Samuel Whitlocke Gandy*, *Richard Boodle*, and *John Welstead Sharpe Powell* (whom she also appointed her executors,

executors) upon the trusts therein mentioned, and she bequeathed the residue of her personal estate to the trustees of the *London Clerical Education Society*.

1836.

CLEMENTSON *v.* GANDY.

The testatrix died on the 27th of *November* 1833. The bill was filed by *John Clementson*, and the surviving trustees of the indenture of the 30th of *November* 1816 against the executors of the will, and it prayed that the legacy of 6000*l.* with interest from the date of one year from the death of the testatrix might be paid by the Defendants to the Plaintiffs for the benefit of the Plaintiff *John Clementson*.

The Defendants by their answer admitted assets; but they insisted, for the reasons stated in the answer, that the testatrix intended to refer to the indenture of the 14th of *October* 1817 instead of the indenture recited in her will; and that she made her will under the belief that she had the power of disposing of the sum of 9682*l.* 6*s.* comprised in the indenture of *October* 1817. And the Defendants further submitted that even if the Plaintiff *Clementson* had a claim to the legacy of 6000*l.*, he was bound to elect between that legacy and the interest which he also claimed under the indenture of *October* 1817.

The Defendants had entered into evidence for the purpose of shewing that the testatrix, shortly before the date of her last will, addressed a letter to her solicitor Mr. *John Coles Symes*, in which she referred to some prior will, expressing a doubt whether she had not given more property than she possessed, and desired her solicitor to make an estimate of her property, for which purpose she transmitted to him her banker's book. That in that letter the testatrix declared that if she had given more than she had, she must make a different disposition

1836.

CLEMENTSON v. GANDY.

disposition of her property, that the "Clergy Education Society might not be a residuary legatee only in name; that in her banker's book the sum of 9682*l.* 6*s.* was treated as the testatrix's absolute property, and that it was in fact so considered by the testatrix at the time of making her will, and of her death; that Mr. *Symes*, on examination of the state of her property, found that, with reference to the testamentary disposition which the testatrix had then made, there would be a deficiency of assets for the payment of legacies, and that he wrote a letter to the testatrix to that effect; that there was no actual deficiency of assets, inasmuch as it had been discovered that the testatrix was entitled to a reversionary interest, of which she was ignorant at the time of making her will.

The letters referred to in the evidence of Mr. *Symes* were found after the decease of the testatrix in the same box which contained her will. The deed of the 30th of *September* 1816 was not produced, and it did not appear whether it was in existence.

This evidence being tendered on the part of the Defendants,

Mr. *Pemberton* and Mr. *Stuart* contended that it was not admissible. It was a settled rule that no evidence could be received to contradict the intention expressed in the will, where the expressions used by the testator were free from all ambiguity. Here it was attempted to shew by extrinsic evidence that the testatrix had made two mistakes. First, it was said that she meant to confirm the deed of *October* 1817, and not the deed of *September* 1816; and, secondly, that she supposed she had the power of disposing of the whole of the stock comprised in the deed of *October* 1817. The first suggestion

1836.

CLEMENTSON v. GANDY.

tion that she meant to confirm the deed of *October* 1817 was totally inconsistent with the other supposition that she was ignorant of the contents of that deed, and believed that the property comprised in it was at her absolute disposal. The evidence of the solicitor who drew the will could not be received to explain the intention of the testatrix, if the words were doubtful; *Ulrich* v. *Litchfield* (*a*); still less was such evidence admissible if the expressions used by the testatrix were unambiguous, and there was no doubt as to the person who was the object of her bounty. Where extrinsic circumstances have let in a latent ambiguity, as where no such person was to be found as the legatee named in the will, parol evidence was admissible to explain the ambiguity; *Thomas* v. *Thomas* (*b*); a latent ambiguity must be shewn to let in parol evidence, but in this case there was no ambiguity whatever. The misstatement of the month in the recital of the deed of *September* 1816 created no ambiguity, for that deed was in all other respects correctly recited; and it was clear that, although that deed was delivered up to the testatrix, it was not cancelled, for she referred to it in her will. It was admitted that there were assets to answer all the bequests given by the will; the state of the property, therefore, was so far perfectly consistent with the expressed intention of the testatrix; and the Court was called upon to let in extrinsic evidence for the purpose of raising a conjecture as to the testatrix's preference of her residuary legatees, a preference which would have the effect of cutting down all the legacies expressly given by the will.

Mr. *Kindersley* and Mr. *Paynter*, *contrà*.

That the intention of the testator must be collected from the will itself, and not from extrinsic circumstances

(*a*) 2 *Atk.* 372. (*b*) 6 *T. R.* 671.

1836.

CLEMENTSON v. GANDY.

stances independent of the will, is a proposition which cannot be disputed; but it is also a rule of law, not less established by the authorities, that the Court may inquire into all extrinsic facts and circumstances relating to the person of the legatee, and to the state of the testator's family and property, in order that the Court may place itself in the position of the testator, and be thereby enabled to put a right construction on the words of his will. *Hinchcliffe* v. *Hinchcliffe* (*a*), *Druce* v. *Denison* (*b*), *Lowe* v. *Lord Huntingtower* (*c*), *Wigram on the Admission of Extrinsic Evidence in the Interpretation of Wills.* (*d*) There is in this case positive evidence to shew that the property which the testatrix believed she had a right to bequeath was not property of which she had any power to dispose. That is a fact as to the state of her property which the Court is bound to ascertain in order to collect the real intention of the testatrix. The mistake as to the property brings the case exactly within the principle of the exception to the general rule, laid down by Lord *Coke* in *Cheyney*'s case (*e*), namely, that a will cannot be construed by any averment out of it. It is said that, if this evidence were admitted, the effect of it would be to cut down all the legacies expressly given by the will. The admissibility of the evidence is not to be tried by considering what will be the effect of admitting it; but, if the evidence be admissible, the question will be whether that effect was or was not intended by the testatrix. In *Druce* v. *Denison* (*g*), Lord *Eldon*, following the authority of *Pulteney* v. *Lord Darlington* (*h*), held that parol evidence was admissible to shew whether a testator,

(*a*) 3 *Ves.* 516.
(*b*) 6 *Ves.* 385.
(*c*) 4 *Russ.* 532. n.
(*d*) p. 36.
(*e*) 5 *Co.* 68.
(*g*) 6 *Ves.* 385.
(*h*) *Reg. Lib.* A. 1773, fol. 710., cited in *Pole* v. *Lord Somers*, 6 *Ves.* 309.; and in *Hinchcliffe* v. *Hinchcliffe*, 3 *Ves.* 521.

testator, under the words " my personal estate," intended to include property which was not strictly, though in some sense, his. It has been supposed that *Druce* v. *Denison*, and the cases of the same class which it follows, have been shaken by the subsequent case of *Doe dem. Oxenden* v. *Chichester* (*a*); but there is a distinction between the admission of parol evidence to raise a question of election, and the admission of it to make property pass which is not in the will. The case of *Doe dem. Oxenden* v. *Chichester* was of the latter description. In the present case, supposing the testatrix not to have mistaken the deed to which she refers, she certainly mistook her interest in the property; and Mr. *Clementson* is bound to elect between the interest given to him under the will, and that given to him under the deed of *October* 1817. In *Weall* v. *Rice* (*b*), Sir *John Leach* held that, for the purpose of supporting the presumption against a double provision, and of raising a case of election, the declarations of the testator as to his intentions at the time of making his will were admissible evidence. Sir *Edward Sugden*, in the last edition of his *Treatise on Powers* (*c*), recognises the authority of *Druce* v. *Denison*; and introduces into the text the general proposition, that, in cases of election and satisfaction, parol evidence is admissible to shew that the testator considered property subject to a power as part of his own property.

Mr. *Pemberton*, in reply.

Druce v. *Denison* has undoubtedly been shaken, if not over-ruled, by *Doe dem. Oxenden* v. *Chichester*. But *Druce* v. *Denison* was a case of election, and has no application; for in this case there is nothing upon the face of

(*a*) 4 *Dow.* 65.; and see 1 *Swanst.* 402. note to *Dillon* v. *Parker*; and *Wigram's Treatise*, p. 28. 2d edit.

(*b*) 2 *Russ. & Mylne*, 251.

(*c*) Vol. ii. p. 170. 6th edit.

1836.

CLEMENTSON v. GANDY.

of the will to shew that the testatrix intended to devise property which did not belong to her, and it is admitted that her property is more than sufficient to answer all the particular dispositions which she has made. It is impossible to go into evidence to shew that she meant to give a larger sum by way of residue for charitable purposes than that which will actually remain. A residue is in its nature of uncertain amount; and a testator is never supposed to know, nor can he in fact know, what it will amount to. The testatrix lived thirteen months after the time at which the solicitor is said to have informed her of her mistake as to the amount of her property, and she made no alteration in her will. That fact is of itself sufficient to demonstrate the soundness of the rule which requires that the intention of a testator shall be sought only in the will itself, and the danger which would result from seeking evidence of intention in any extrinsic circumstances.

The MASTER *of the* ROLLS.

I am of opinion that this evidence cannot be admitted. It is tendered for the purpose of shewing that the testatrix bequeathed property as her own which did not belong to her, and that she intended to leave a considerable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she intended; and it is argued that this raises a case of election. The intention to dispose must in all cases appear by the will alone. In cases which require it, the Court may look at external circumstances, and, consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood.

stood. Here the intention to dispose is clearly expressed by the testatrix; there is no ambiguity in the expressions she has employed; and extrinsic evidence for the purpose of contradicting the intention is inadmissible.

1836.

CLEMENTSON v. GANDY.

An inquiry as to the contents of the deed referred to by the will, which was not produced at the hearing, was offered by the Court to the Defendants, but declined on their part; and a decree was therefore made for the payment of the legacy of 6000*l.*, and interest from the period of twelve months from the death of the testatrix.

WOOD *v.* COX.

July 23, 25, 26.

A testatrix bequeathed all her personal property to *C.*, whom she appointed one of her executors, to his own use and benefit for ever, trusting and wholly confiding in his honour that he would act in strict conformity with her wishes. On the same day on which she made her will, she executed a testamentary paper, by which she gave several annuities and legacies, and, among others, a legacy to the person who was her sole next of kin:

Held, that *C.* took no beneficial interest, but was a trustee of the residue for the next of kin.

SARAH CROMPTON made her will, dated the 25th of *April* 1833, in the following words:—"I hereby devise, give, and bequeath all my house in *Bryanstone Square*, and all the furniture, jewels, plate, and effects therein, and also all my monies whatsoever, and all my estate, property, and effects whatsoever and wheresoever, both real and personal, and of whatsoever nature or kind the same may be, unto Sir *George Matthias Cox*, Baronet, [and *Thomas Wilson*,] his heirs, executors, administrators, and assigns, for his and their own use and benefit for ever, trusting and wholly confiding in his honour that he will act in strict conformity with

1836.
Wood
v.
Cox.

with my wishes. I hereby appoint the said Sir *George Cox* and *Thomas Wilson* the executors of this will, and and hereby revoke all former wills."

On the same day the testatrix executed a testamentary paper, by which she gave several annuities and legacies to the persons therein named; and, among the legacies, a sum of 100*l.* to the Plaintiff, *Daniel Wood*, who was her father, and sole next of kin. To this testamentary paper were annexed the words "Such is the will of *Sarah Crompton*" in the handwriting of the testatrix.

The testatrix died three days after the execution of the will and testamentary paper, and the same were duly proved by the executors named in the will. The words [and *Thomas Wilson*], originally written in the will, were directed by the testatrix to be erased, and a line was accordingly drawn through them. The bill was filed against the executors by the Plaintiff, who claimed to be entitled, as next kin, to the residue of the testatrix's personal estate; and the question was, whether the Defendant, Sir *George Matthias Cox*, took a beneficial interest under the will, after payment of the debts and legacies, or whether he was a trustee of the residue for the Plaintiff.

Mr. *Pemberton*, Mr. *Richards*, and Mr. *Bigg*, for the Plaintiff.

The circumstance of the testatrix having originally intended to make this bequest to both the persons whom she appointed her executors, affords an inference that she did not mean to give a beneficial interest to either of them, and that Sir *George Cox* takes only as a trustee. The words "and their," coupled with the words "own use and benefit," remain by accident unerased; and the testatrix must be taken to have used the words "own use

1836.
Wood
v.
Cox.

use and benefit," as applied to Sir *George Cox* alone, in no larger sense than she meant to apply them, had the names of both executors been retained in this part of the will. That she did not mean Sir *George Cox* to take her whole property to his own use is clear, because she goes on to express her trust and confidence that he will act in conformity with her wishes; and the testamentary paper shews *pro tanto* what the wishes of the testatrix were. That it did not disclose the whole of her wishes in respect to the disposition of her property is manifest from this circumstance, that she afterwards mentioned certain legacies which she intended to include in the testamentary paper. That fact is stated in the answer of Sir *George Cox*. The question is not, whether by possibility the testatrix meant that Sir *George Cox* should take the surplus, after acting in conformity with her wishes, but whether she has expressed such an intention. The trust and confidence that he would act in conformity with her wishes are quite as strong to exclude the notion that she meant to give him any beneficial interest, as the words "own use and benefit" are to negative the supposition that he was to take as a mere trustee; and the difficulty, with which the Court has to deal, is to reconcile or choose between those conflicting expressions. Suppose the testatrix had made no written declaration of her wishes, could Sir *George Cox* in that case have taken her whole property to his own benefit? That would have been clearly against the intention of the testatrix, and contrary to the principles of this Court, for a trustee cannot be converted into a *cestui que trust*. In *Hill* v. *The Bishop of London* (*a*), where the testator devised an advowson to his mother-in-law, "willing and desiring her to sell it" in the manner by his will directed, Lord *Hardwicke* was of opinion that the words "willing and desiring" did not raise a trust; and that there

(*a*) 1 *Atk.* 618.

1836.

Wood v. Cox.

there was consequently no resulting trust of the next avoidance to the heir-at-law, the words "willing and desiring" being more properly words of injunction than of trust. In that case the absence of the word *trust* was considered as an important circumstance; but here no such objection can apply, for there are the emphatic words "trusting and wholly confiding." In *King* v. *Denison* (*a*) Lord *Eldon* points out the nicety of distinction upon which the courts have gone between a devise charged with debts, and a devise upon trust to pay debts, and observes that, "the former is a devise for the purpose of giving the devisee the beneficial interest, subject to a particular purpose, and the latter a devise for a particular purpose, with no intention to give any beneficial interest." Applying this principle to the present case, is this a bequest to Sir *George Cox*, charged with the payment of the legacies, or is it a bequest upon trust to pay the legacies? If the latter, and the payment of the legacies do not exhaust the bequest, there will be a resulting trust for the next of kin.

Mr. *Kindersley* and Mr. *Williams*, *contrà*.

If the construction for which the Plaintiff contends be given to the will, the words "own use and benefit" must be struck out of it. These are words, as to the meaning of which there can be no doubt; whereas it is by no means clear that the testatrix intended to create a technical trust by the words to which that effect is sought to be given. "Trusting and wholly confiding in a man's honour" rather negatives than implies a desire to raise a legal obligation. The intention to give a benefit in the first part of the sentence is plain, and open to every one's apprehension; that of taking the benefit away, in the other branch of the

(*a*) 1 *V. & B.* 272.

1836.

Wood v. Cox.

the sentence, is only the deduction of technical ingenuity. As it is not necessary, on the one hand, that the word "trust" should be used to create a trust, neither does the word "trusting," on the other hand, necessarily raise a trust in the technical sense of the word. In *Curtis* v. *Rippon* (*a*), where the testator gave all his real and personal estate to his wife, "trusting that she would, in fear of God, and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good; remembering always, according to circumstances, the church of God, and the poor;" the Court held that the will created no trust for the children, but that the wife took absolutely. It has been laid down that to create a trust by means of an obligation upon the conscience of a devisee, the subject must be certain, and the object as certain as the subject; *Wright* v. *Atkyns*. (*b*) Now, for any thing that appears upon the face of the will, the wishes of the testatrix, in conformity with which she trusts that Sir *George Cox* will act, might have reference to something wholly unconnected with her property. The subject of the trust, therefore, is not certain, and, as to the object of it, this is not noticed upon the will. In *Dawson* v. *Clarke* (*c*), where a testator gave his estate and effects to two persons whom he named his executors, their heirs, executors, &c., upon trust, in the first place, to pay, and charged and chargeable with all his debts and legacies, Lord *Eldon* decided that they took the absolute interest, subject only to a charge. By holding this bequest to be a bequest of the absolute interest, subject to a charge, a natural and sensible construction will be given to this will; by treating it as mere trust, the plain intention of the testator will be defeated.

Mr.

(*a*) 5 *Mad.* 434.
(*b*) *Turn. & Russ.* 157.
(*c*) 15 *Ves.* 409. and 18 *Ves.* 247.

1836.

WOOD v. COX.

Mr. *Pemberton*, in reply.

It must be admitted that the point raised by this bequest is one of extreme nicety. Sir *William Grant* decided the case of *Dawson* v. *Clarke* (*a*), upon a ground which the late statute (*b*) has rendered inapplicable to the present case; namely, that the executors were entitled, as such, to the undisposed of residue. Lord *Eldon*, indeed, seems to have ultimately disposed of the case upon the ground which Sir *Wm. Grant* thought it unnecessary to consider; but he felt great difficulty in the case, and the precise grounds of his final decision do not appear. It is much too subtle and shadowy a distinction to suppose, that by the words "trusting in his honour" the testatrix not only did not intend to create a technical trust, but that she meant to relieve him from all legal obligation. Unless honour be something wholly different from conscience, she clearly intended to impose an obligation upon his conscience; and, if she intended to impose an obligation upon his conscience, that intention is sufficient to create a trust in a court of equity.

July 26.

The MASTER *of the* ROLLS.

The question is, whether the residuary estate of this testatrix is given beneficially to the defendant, Sir *George Cox*, or whether it belongs to the Plaintiff, as next of kin, by way of resulting trust.

The testatrix, in the first place, gives and bequeaths all her estate and effects in the following manner (his Lordship read the will).

A separate piece of paper, containing a list of several legacies, was attested by the testatrix in these words, in

(*a*) 15 *Ves.* 409. (*b*) 1 *W.* 4. *c.* 40.

1836.

WOOD v. COX.

in her own hand-writing, "such is the will of *Sarah Crompton.*"

The gift is in the first instance made to Sir *George Cox*, absolutely, for his own use and benefit for ever; and if the will had stopped there, and were followed only by the list of legacies contained in the testamentary paper, there would be no doubt in this case; but that the testatrix did not use the words "for his own use and benefit" in an absolute and unrestricted sense is clear, because she goes on to say, "trusting and wholly confiding in his honour, that he will act in strict conformity with my wishes." In what respect he was to act in conformity with her wishes she does not say; and it is argued that, for any thing that appears in this will, her intention might have been that Sir *George Cox* should do some act in no way affecting the disposition of her property. It is plain, however, from the testamentary paper, that she meant the payment of certain legacies; but then it is said that she meant those particular legacies and no more; and that, subject to the payment of those legacies, Sir *George Cox* must be considered as absolutely entitled to the property of the testatrix for his own use and benefit. Considering that the testatrix would have had no occasion to trust to the honour of Sir *George Cox*, if she had meant to give him the whole beneficial interest in her property, subject only to the payment of the legacies enumerated in the testamentary paper, which, without the words "trusting and confiding," &c. the legatees would have had a legal right to recover, and connecting the words "in conformity with my wishes" with the words "such is the will of *Sarah Crompton*," I think that her wishes were the disposition of all her property; and that by the words "trusting and wholly confiding in his honour that he will act in strict conformity

1836.
Wood
v.
Cox.

formity with my wishes," she meant to express her confidence that he would act in conformity with her wishes in the disposition and application of all her property. The list of legacies indicated her wishes *pro tanto*. Did it indicate all her wishes? It appears not; for it is admitted that there were other legacies which she desired to add; and she cannot, by that testamentary paper, be considered as having precluded herself from making any further disposition of the property which she possessed.

The question depends wholly upon the effect which the testatrix intended to give to the words "for his own use and benefit." The same sort of difficulty, which arises in this case, occurred in *Dawson* v. *Clarke*, where the gift was "in trust in the first place to pay, and charged and chargeable with, all the testator's debts and legacies." Lord *Eldon* states that the difficulty he felt in that case was whether he was to construe the words "upon trust" to mean "charged and chargeable," or the words "charged and chargeable" to mean "upon trust." Lord *Eldon* gave effect to the words "charged and chargeable" upon some ground which does not appear in the report. It might be that he considered the last words used in the will explanatory of the first.

There seems to be a stronger contrast between the words "own use and benefit," and "trusting and confiding, &c.," than between the words "upon trust," and "charged and chargeable;" and there is consequently a greater difficulty in considering one set of words as explanatory of the other. The present testatrix does not use the words "for his own use and benefit" in their ordinary sense, for she adds words which shew that she did not intend Sir *George Cox* to employ her property, or

1836.

WOOD v. COX.

or at least the whole of it, for his own use and benefit. It is certainly very possible that the testatrix intended Sir *George Cox* to have the surplus of her estate after paying her debts and legacies; but, if that were her intention, the will is not so expressed as to make it apparent.

The conclusion, therefore, to which I have come, though not without considerable hesitation, is, that the property given by the testatrix to Sir *George Cox* is given in trust, and that the residue, after payment of the debts and legacies, belongs to the next of kin.

STOCKS *v.* DODSLEY.

July 30.

A testator gave a legacy of 500*l.* to his wife, and after her decease to *G. W.*; and if *G. W.* should die in her lifetime, to such person or persons as he should by will appoint; and in default of appointment, after the death of his wife, to the executors and administrators of *G. W.* absolutely. *G. W.* died, having made a will by which he appointed an executor, but made no appointment of the legacy. The executor did not take a beneficial interest in the legacy.

THE will of *John Lindley*, dated the 3d of *May* 1797, contained the following bequest: —

"I give and bequeath to my friend *George Wragg* the sum of 500*l.*, to be paid to him from and immediately after the death of my dear wife *Ann Lindley*, by and out of my real estate, which I do hereby expressly charge with the payment thereof; and if it should happen that the said *George Wragg* should die in the lifetime of my said wife, then I give and bequeath the said legacy of 500*l.* to such person or persons as the said *George Wragg* shall by his last will and testament in writing direct or appoint the same to be paid to; and, for want or in default of such will, then I give and bequeath the same,

1836.

STOCKS v. DODSLEY.

same, from and after the death of my said wife, to the executors and administrators of the said *George Wragg* absolutely."

The testator died shortly after the date of his will, leaving his wife, *Ann Lindley*, and *George Wragg* surviving him. *George Wragg* died in *June* 1801, leaving *Ann Lindley* surviving him, and having made a will, by which he appointed *Richard Burder* his executor, but he made no appointment by his will of the legacy of 500*l.*

Richard Burder proved the will of *George Wragg*, and died in *April* 1812, having made a will by which he appointed *William Wylde*, *Thomas Bolton*, and *James Hall* his executors. *Ann Lindley* died in *January* 1820, and administration with the will annexed of *George Wragg* was granted to the petitioner *Stocks*.

The question raised by the petition was, whether the legacy of 500*l.* belonged to the petitioner, as part of the personal estate of *George Wragg*, or whether it passed to the executor of *George Wragg* for his own benefit.

Mr. *Kindersley*, for the petitioner.

Where a bequest is made to executors or administrators, the Court will hold such executors or administrators to take as trustees, unless the testator has expressly indicated an intention that they shall take for their own benefit. In *Sanders* v. *Franks* (*a*) a power of appointing to a leasehold estate was given to the testator's wife; and, in default of appointment, the estate was given to her executors or administrators to and for his, her, or their own use and benefit. The wife died without having

(*a*) 2 *Mad.* 147.

1836.

STOCKS v. DODSLEY.

having made any appointment, and her administrator was held to be beneficially entitled to the leasehold estates. The language in that case was so strong as to render it impossible for the Court to put any other construction upon the bequest. *Collier* v. *Squire* (*a*) is a case in point with the present. In that case there was a limitation in a marriage settlement to the executors and administrators of the husband in default of appointment by the husband; and the husband having died without exercising his power, but having made a will by which he appointed an executrix, it was held that the executrix was not beneficially entitled to the fund, but that it was to be administered by her as part of the testator's general estate. In *Palin* v. *Hills* (*b*) the argument was between the next of kin and the residuary legatee; and it was admitted on all hands that the executor could only be a trustee for one of them. The word "absolutely" will be relied upon in the present case; but that word is properly used with reference to the entirety, and not to the beneficial nature of the interest. The executors of *George Wragg*, after the death of the testator's wife, were to take the entire and absolute interest in the property, but they were to take it as part of *George Wragg*'s general estate. The word "absolutely" is not nearly so strong as the words "for his own use and benefit;" and yet those words, coupled with expressions of trust and confidence, were, in the late case of *Wood* v. *Cox* (*c*), held insufficient to give a beneficial interest.

Mr. *Cockerell*, for the legal representatives of *George Wragg*.

The inclination of the Court has undoubtedly been to hold, that a gift to an executor shall be considered as a gift

(*a*) 3 *Russ.* 467.
(*b*) 1 *Mylne & Keen*, 470.
(*c*) *suprà*, p. 317.

1836.

STOCKS v. DODSLEY.

a gift to him in his character of trustee for the estate which he represents, and that he cannot take it as *persona designata*. *Sanders* v. *Franks*, however, shews that an administrator may be so clearly designated as the person who is to take beneficially that the Court must give effect to the testator's intention, however capricious or improbable, *à priori*, that intention might appear. The question here is, whether the word "absolutely" was not used by the testator in its most obvious and natural sense; and, if so, the executors of *George Wragg* are, in the events which have happened, the persons entitled to the legacy.

The MASTER *of the* ROLLS.

The testator gives a legacy of 500*l.* to his wife, and after her decease to *George Wragg*; and, if *George Wragg* should die in the lifetime of his wife, he gives the legacy to such person as *George Wragg* should by his will appoint; and, in default of appointment, to the executors and administrators of *George Wragg* absolutely. It is so extremely improbable that the testator meant the executors of *George Wragg* to take otherwise than for the benefit of the estate which they should represent, and for the purposes of their testator's will, that I cannot consider them as entitled to a beneficial interest in the legacy.

1836.

GLYNN *v.* HOUSTON.

Dec. 17. 19.

Demurrer to a bill for discovery in aid of an action brought by the Plaintiff to recover damages for an assault and false imprisonment, allowed, the whole object of the bill being to obtain a discovery of matters which, if established, would have subjected the Defendant to penal consequences.

The whole object of a bill of discovery being criminatory, a general demurrer does not cover too much, because some of the interrogatories, separately considered, may relate to matters not directly criminatory.

Semble, that a bill of discovery in aid of an action for a mere personal *tort* cannot be sustained.

THIS was a bill for a discovery in aid of an action brought by the Plaintiff against the Defendant, to recover damages for an alleged assault and false imprisonment.

The bill stated that, in the year 1831, the Plaintiff, *Charles Glynn*, was resident at *Gibraltar*, and carried on business there as a *British* merchant, and that the Defendant, Lieutenant-General Sir *William Houston*, was also resident at *Gibraltar* at that time as Governor of *Gibraltar*: That, under the pretext of searching for one General *Torrigos*, a subject of the kingdom of *Spain*, whom the Defendant alleged he was desirous to seize and capture, the Defendant, in *November* 1831, ordered and commanded Lieutenant-Colonel *John Hastings Muir*, his military secretary (since deceased), with a party of soldiers, to search the private dwelling-house of the Plaintiff in *Gibraltar*; and that, in pursuance of such order, a detachment of his Majesty's soldiers, under the command of the said Lieutenant-Colonel *Muir*, did surround and blockade the premises of the Plaintiff, and that Lieutenant-Colonel *Muir* caused sentinels to guard the Plaintiff's premises, to prevent any person from quitting the same, and that the said soldiers proceeded to search the dwelling-house of the Plaintiff, and premises adjoining, and kept the same blockaded and surrounded by force for the space of several hours.

The bill proceeded to state that, during the continuance of such search and proceedings, the Plaintiff

1836.

GLYNN
v.
HOUSTON.

wished and attempted to go out of his dwelling-house, and was by force and coercion prevented by the sentinels from so doing, and that one of such sentinels presented his bayonet, and threatened to wound and kill the Plaintiff, if he persisted in attempting to quit his house: That the said General *Torrigos* was not, and had not been on the Plaintiff's premises, and that there was no foundation whatever for such search and illegal proceedings.

The bill alleged that the acts done by Colonel *Muir* and the soldiers were done either in pursuance of the express order of the Defendant, or were the necessary result and consequence of the said order in the military sense and acceptation thereof; and as proof thereof, it proceeded to state that, on the occasion of an interview which the Plaintiff afterwards had with the Defendant, Sir *William Houston*, in the presence of Colonel *Muir*, the Defendant said that Colonel *Muir* was not in fault, for that he was sent down to the Plaintiff's house, and acted under his (the Defendant's) orders.

The bill stated that the Plaintiff had commenced an action in the Court of Common Pleas against the Defendant, for the recovery of damages for such assault and false imprisonment.

The bill contained a charge, that the Defendant had in his custody divers deeds, military and other orders, reports, books, letters, cases stated for counsel's opinion, and other papers, writings, &c. as to which, and all other matters inquired into by the bill, it prayed a discovery.

The Defendant put in a general demurrer for want of equity.

Mr.

1836.

GLYNN v. HOUSTON.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *John Romilly*, in support of the demurrer.

This is the first instance in which an attempt has been made by a Plaintiff to obtain a discovery in aid of an action brought by him to recover damages for a personal tort. Supposing the alleged injury to have been committed, the matter sought to be discovered would subject the Defendant to a criminal prosecution; a ground of objection which is, of itself, sufficient to support this demurrer. In the next place, the bill is against public policy, as it impugns the authority of a person exercising the functions of the Crown, and seeks to subject that person to penal consequences for acts done in the performance of the duties of his office. The same objection applies to that part of the bill which seeks a discovery of military orders, and other documents in the archives of the government of which the Defendant is the supreme officer. The Court has gone to this extent, that, if an action for damages is brought by an individual for an offence, which it was open to him to treat either criminally or civilly, and he has elected the civil remedy, the Defendant at law is so far entitled to the aid of the Court that he may obtain a commission to examine witnesses abroad; but he cannot obtain a discovery, inasmuch as the matter sought to be discovered might subject the Defendant in equity to criminal proceedings. *Thorpe* v. *Macaulay* (*a*), *Macaulay* v. *Shackell.* (*b*) In this case the Plaintiff has brought an action against the Defendant to recover damages for an assault and false imprisonment. The alleged injury owes much of the exaggerated colouring which has been given to it to the ingenuity of the pleader who drew the bill. Sir *William Houston*, having received information that a person

(*a*) 5 *Mad.* 218. (*b*) 1 *Bligh. N. S.* 96.

1836.
GLYNN
v.
HOUSTON.

person obnoxious to the government was secreted in the house of the Plaintiff, resorted to such measures as were considered necessary to secure the arrest of that person, and, while the search was made, the Plaintiff was, no doubt, subjected to some restraint. Even if the governor were not justified in subjecting the Plaintiff to that temporary restraint, a jury would probably consider the most trifling damages a sufficient compensation for the little inconvenience which the Plaintiff sustained, if the Plaintiff confined himself to his civil remedy. The Plaintiff asks for no commission by his bill, but merely for a discovery of acts which, if admitted, the Plaintiff might use as the foundation of a criminal proceeding. This Court has never gone beyond the granting of a commission to examine witnesses in any case where its interference has been sought in aid of an action for a mere personal tort. In *Cojamaul* v. *Verelst* (*a*), an action was brought by *Cojamaul* against *Verelst*, who was the governor of *Calcutta*, for having caused him to be unlawfully arrested, and conveyed to *England* against his will. *Verelst* filed a bill in the Court of Exchequer against the Plaintiff at law for a commission to examine witnesses abroad, and for an injunction. *Cojamaul* put in an answer to the bill, and the Plaintiff in equity obtained orders for a continuance of the injunction upon the merits confessed by the answer, and for a commission to examine witnesses. Those orders were appealed from, and reversed by the House of Lords. In *Nicol* v. *Verelst* (*b*), which was a case of a similar kind against the same governor, the appeal was unsuccessful, but the decree of the Court below extended only to a commission to examine witnesses. Those cases were relied upon by Sir *John Leach*, in *Thorpe* v. *Macaulay*, as furnishing some authority that

(*a*) 4 *Bro. P. C.* 407. ed. *Toml.* (*b*) 4 *Bro. P. C.* 426. ed. *Toml.*

1836.

GLYNN v. HOUSTON.

that the Court would not altogether decline to interfere in aid of an action proceeding *ex delicto*, and he accordingly granted a commission, but refused the discovery. In *Lord Montague* v. *Dudman* (*a*), Lord *Hardwicke* said that a bill of discovery does not lie to aid the prosecution of an indictment or information, or to aid the defence to it. Now, if the charges made in this bill are true, and the Plaintiff obtains the discovery which he seeks, what is to prevent him from immediately proceeding against the Defendant by way of indictment or information, or what is to prevent the Attorney-General from instituting, if he think fit, a criminal prosecution against him? In the last case cited, which was a bill for a discovery, and injunction to stay proceedings under a writ of *mandamus*, Lord *Hardwicke* said "he would go by *Littleton*'s rule, that it is a good argument that an action lies not, because one was never brought, and as he never knew a bill of the kind then attempted to be sustained, he would not make the precedent." That observation is directly applicable to the present case.

Mr. *Griffith Richards* and Mr. *Rogers*, *contrà*.

In *Thorpe* v. *Macaulay* (*b*) Sir *John Leach*, in noticing the argument which was urged in that case, as upon the present occasion, that a Court of Equity would not lend its aid to either party in an action proceeding *ex delicto*, says expressly that "no such limitation of the jurisdiction as to discovery is hinted at in any book of practice, or by the *dictum* of any judge;" and he was of opinion that the parties in any action at law, were entitled to the ordinary aid of the Court. It is to be observed that the learned Judge does not restrict the right to the Defendant at law, his observations being at

(*a*) 2 *Ves.* sen. 396. (*b*) 5 *Mad.* 218.

1836.

GLYNN v. HOUSTON.

at least as applicable to the Plaintiff at law as to the Defendant. It must be admitted that no case is to be found where the Plaintiff filing a bill for a discovery was also the Plaintiff at law, who had brought the action *ex delicto* in aid of which the discovery was sought; but upon principle there is no reason why he should be deprived of that right. As to the argument that, if the discovery is made, the Plaintiff in equity may proceed by indictment or information, no instance can be shewn in which any governor of a colony, or any other person has been criminally prosecuted in this country for an offence committed abroad, except under particular statutes, which have made provision for such a case, as the 35th of *Hen.* 8. *c.* 2. in respect of treason, and the acts making similar provisions in respect of murder or manslaughter, or where the offence, being committed on the high seas, falls within the jurisdiction of the Court of Admiralty. The Defendant is, no doubt, protected by the rules of the Court from answering questions directly relating to facts, the admission of which may subject him to a penalty; but there are many interrogatories in this bill which he may answer with perfect safety, and though he is protected from making admissions which may subject him to penal consequences, he cannot refuse to answer as to collateral facts, although they may have a tendency to criminate him: *Weaver* v. *The Earl of Meath* (*a*), *Finch* v. *Finch* (*b*), *Chambers* v. *Thompson* (*c*), *The East India Company* v. *Neave* (*d*) This demurrer, therefore, being a general demurrer for want of equity, and extending to the whole bill, covers too much, and is consequently bad.

Mr.

(*a*) 2 *Ves.* sen. 108.
(*b*) ibid. 491.
(*c*) 4 *Bro. C. C.* 434.
(*d*) 5 *Ves.* 175.

1836.

GLYNN v. HOUSTON.

Mr. *Pemberton*, in reply.

The admitted fact that there is no instance of a bill of discovery having been filed by a Plaintiff in aid of an action, brought by himself for a mere personal *tort*, is stronger than any argument that can be urged to shew that such a bill cannot be sustained. In cases of *tort* connected with property bills of discovery by Plaintiffs are as frequent as in any other cases; but not a single instance can be produced of such a bill having been filed where the Plaintiff complains of a personal injury unconnected with property. See the consequences of admitting such a jurisdiction. At present, the Court will not entertain any suit where the amount of the property in question is less than 10*l.*; but if such a bill as this, in which property is wholly excluded from consideration, can be sustained, there is no personal *tort*, however trifling, which may not be made the subject of a bill of discovery in this Court; and if a bill may be filed for discovery in a case of personal *tort*, why not for relief? It has been said that the misconduct of Governors cannot be made the foundation of criminal proceedings in this country; but who has not heard of the cases of Generals *Wall* and *Picton*, or of the impeachment of *Warren Hastings?* Governors, as well as all other subjects, are criminally responsible for their acts as well before the ordinary tribunals as before the great tribunal of the nation. (*a*) As to the military

(*a*) See the case of *Mostyn* v. *Fabrigas*, *Cowp.* 161. "To lay down," says Lord *Mansfield* "in an *English* Court of justice such a monstrous proposition as that a governor, acting by virtue of letters patent under the great seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and injure his majesty's subjects, both in their liberty and property, with impunity, is a doctrine which cannot be maintained." p. 175.

1836.
GLYNN
v.
HOUSTON.

military orders and instructions given by the Governor, in his official capacity, these are documents which, from their very nature, are connected with the discharge of his public duties, and ought, on the ground of the public inconvenience which might result from the disclosure of them, to be protected from discovery. Some parts of the bill might, perhaps, if they could be separated from its main object, be answered without subjecting the Defendant to any penalty; but the question is, whether the whole scope of the bill is not to criminate the Defendant; and if that is its sole object, the Court will not put the Defendant to answer a few questions, which might, if they could be separated from those which are directly criminatory, be considered free from objection. The general demurrer, therefore, does not cover too much.

The MASTER *of the* ROLLS.

It cannot be doubted that a Governor of a colony, or any person whatsoever, however high his rank, acting in the service of the Crown, whether in this country or elsewhere, is answerable for any wrong he may commit to a party injured, by an action for damages, or criminally, if the justice of the case demand a criminal prosecution. I cannot concur in the observation made at the bar that the injury of which the Plaintiff complains is one of a trifling nature. To imprison a man in his own house, to surround his house with soldiers, who threaten his life if he attempt to quit it upon his lawful avocations, is a very considerable injury; and if this wrong has been done, the Plaintiff has his remedy by the action which he has brought. On the other hand, no one is bound to make a discovery to criminate himself. The first question which arises upon this demurrer is, whether this is a case of such a nature as gives

gives the Plaintiff a right to discovery. I asked, in the course of the argument, whether any instance could be cited of a bill of discovery in aid of an action brought to recover damages for a mere personal *tort*, and the answer which was given to me confirmed me in the impression, that such a bill could not be sustained. I will look into the authorities which have been cited, and dispose of the case to-morrow as well with reference to the general point, as to the other question which has been raised, whether the demurrer is too extensive, and there are any parts of the bill which ought to be answered.

1836.
GLYNN v. HOUSTON.

At the next sitting of the Court, his Lordship gave judgment as follows: —

Dec. 19.

I have looked into the authorities, which tend very much to confirm my opinion, that a bill of discovery cannot be sustained in aid of an action for a mere personal *tort*. If it were necessary expressly to decide this point, I think it is clear, what the course of my duty would be; but it is not here necessary, because a bill of discovery cannot be sustained in any case where the matter sought to be discovered may be made the subject of a criminal charge; and that objection applies to the present bill, the whole object of which is to obtain a discovery of the alleged fact, that, by the order of the Defendant, the Plaintiff was illegally assaulted and imprisoned. If that fact be established, the Defendant would be subject to penal consequences for his misconduct in that respect. In what way he would be so subject, whether by indictment, information, impeachment, or, if necessary, by a bill of pains and penalties, is immaterial. It is sufficient that he would be subject to penal consequences.

With

1836.

GLYNN v. HOUSTON.

With regard to the objection that the demurrer covers too much, inasmuch as there are parts of the bill that might be answered without subjecting the Defendant to any penalty; the rule as stated by Lord *Eldon* in *Paxton* v. *Douglas* (*a*) is this:—"In no stage of the proceedings can a party be compelled to answer any question accusing himself, or any one in a series of questions that has a tendency to that effect; the rule in these cases being, that he is at liberty to protect himself against answering not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer, containing nothing to affect him, except as a link in the chain of proof that is to affect him."

In the case of *Thorpe* v. *Macaulay* (*b*) before Sir *John Leach*, which was a bill filed by the Defendant in an action for the discovery of matter which, if made out, was in itself criminal, the discovery was altogether refused. It was argued in that case, as in the present, that the demurrer was too extensive; but upon that argument Sir *John Leach* says, "The sole object is to prove the truth of the libel, or in other words to prove the truth of the criminal matter charged; every question asked must necessarily be with a view to that end, and a party is not bound to answer any question, however apparently indifferent, which is in any manner connected with the criminal charge. I am of opinion, therefore, that the Plaintiff is not entitled to any discovery from the Defendant."

In *Green* v. *Weaver* (*c*) Sir *Anthony Hart*, speaking of Lord *Eldon*'s observation in *Paxton* v. *Douglas*, says,

(*a*) 16 *Ves.* 239. and 19 *Ves.* 220.

(*b*) 5 *Mad.* 218.

(*c*) 1 *Sim.* 430.

1836.

GLYNN v. HOUSTON.

says, "I am free to confess, that that case did perplex me excessively by some of the *dicta* laid down by that great judge; for he went there to the extent of stating, not only that a man should not make a discovery that would subject himself directly to penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. — Now when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a bill in equity is, that every statement of fact in every bill ought to be incidentally leading to the same conclusion, ultimately, as the prayer of the bill does lead to; for the fact is either conducive to the general result, or it is unimportant and irrelevant. But I take Lord *Eldon* to have meant (which, perhaps, is not very fully explained in the report), not that every fact which may lead to the effect of subjecting a defendant to a penalty is objectionable; but, where the sole gist and object of the suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a court of equity on the footing of penalty, that, as a court of equity does not relieve on penalty, it will not give any incidental discovery. That is the way in which I reconcile, and get rid of the *dicta* laid down in *Paxton* v. *Douglas*." Sir *Anthony Hart*, after an elaborate examination of the authorities, thought that "from the current of the authorities this result might be derived, that a man, by the effect of his own acts, might exclude himself from the benefit of that rule of a court of equity, or to adopt the expression of a very great judge, he might contract himself out of the protection afforded by the principle of the Court." (*a*)

Not

(*a*) 1 *Sim.* 427.

1836.

GLYNN v. HOUSTON.

Not long after the case of *Green* v. *Weaver* the rule came under the consideration of Chief Baron *Alexander*, in the case of *Maccallum* v. *Turton* (*a*) where, after stating the rule as laid down by Lord *Eldon* that learned Judge in *Paxton* v. *Douglas*, says, with reference to the bill before him, that all the allegations contained in it were links in the chain of proof, which might be adduced against the Defendant should an indictment be preferred; and upon that ground he thought the demurrer to the bill not too extensive.

Now in this case there is not a single allegation in the bill that I can discover, which is not intended to be criminatory. Every act complained of is charged as having been done "either in pursuance of the express order of the Defendant, or as the necessary result and consequence of the said order in the military sense and acceptation thereof."

The whole object of this bill being to procure evidence of that which constitutes a criminal charge, I think the interrogatories that apply to matters not directly criminatory are not to be considered as indifferent; but that those matters, as well as the rest of the bill, are introduced for the purpose of obtaining a discovery, which may enable the Plaintiff to establish the criminal charge. The general demurrer, therefore, must, be allowed.

(*a*) 2 *Yo. & Jerv.* 183.

1836.

STOREY *v.* Lord GEORGE LENNOX.

July 13. 27.

A bill of discovery was filed by the directors of an insurance company, in aid of their defence to an action brought by the Defendant to recover the amount of the sum secured by a policy of assurance effected on the life of a person who died shortly after the date of the policy. The bill alleged that the declaration, on the basis of which the insurance had been effected, was untrue; and it contained the usual charge, that the Defendant had in his possession documents by which the truth of the matters alleged in the bill would appear. The Defendant admitted that he had in his possession the various documents enumerated in the first schedule to his answer; but he said that, since the death of the person whose life was insured, he had, by reason of certain information, contemplated the bringing his action against the Plaintiffs, if they should dispute their liability to pay the amount of the sum secured by the policy, and that the documents contained information as to evidence which could be procured on the Defendant's behalf, and that the producing the same, or permitting the Plaintiffs to inspect the same might disclose the names of witnesses intended to be examined, and evidence intended to be given, on behalf of the Defendant, in the action which he had brought against the Plaintiffs. And he submitted that he ought not to be compelled to produce the said documents or any of them.

Held, that the Defendant could not protect himself from producing documents communicated by, or to parties who stood in no confidential relation to him, on the ground that their production might disclose the names of witnesses, and evidence intended to be given at the trial, and that he was bound to produce all the documents enumerated in the schedule, except the letters written to and from his solicitors, the statements for the opinions of counsel, and the opinions of counsel thereon.

THIS was a motion, on the part of the Plaintiffs, for the production of papers enumerated by the Defendant in the first schedule to his answer, as papers relating to the matters in the cause, and admitted by him to be in his possession.

The bill stated that in the month of *July* 1832, the Defendant Lord *George Lennox* being desirous to effect an insurance with the *Pelican* Life Insurance Company on the life of *Edmund Maysey Wigley Greswolde*, then major of the sixth regiment of dragoons, for the sum of 5000*l.* for seven years, made the usual declaration required by the office respecting the health and habits of a person whose life was required to be insured. That on the faith of that declaration, a policy for 5000*l.* was granted on the 9th

1836.

STOREY v. Lord GEORGE LENNOX.

9th of *August* 1832. That on the 6th of *January* 1833, Major *Greswolde* died. That the office refused payment of the policy, and that in *March* 1836, the Defendant brought an action against the present Plaintiffs, who were three of the directors of the *Pelican* Insurance Company, to recover the amount alleged to be due.

The bill alleged that the policy was improperly obtained by declarations as to the health and habits of Major *Greswolde* which were untrue, and it prayed for a discovery in aid of the Plaintiffs' defence to the action.

The bill contained the usual charge, that the Defendant, his solicitor, or agents, then or lately had in his or their possession or power divers deeds, certificates of medical men, documents, accounts, books, letters, papers, and writings, whereby the truth of the matters in the bill mentioned would appear, and that the Defendant should set forth a list thereof.

In answer to this charge, the Defendant said that he had in his possession or power the several letters and other papers mentioned and enumerated in the first schedule to his answer annexed, and which he prayed might be taken as a part thereof; but he said that on or about the 9th of *February* 1835, he received a letter dated the 5th of the same month of *February*, containing information that since the death of Major *Greswolde* a professional gentleman from *London* had, on behalf of some or one of the insurance companies with whom policies of insurance had been effected on the life of Major *Greswolde*, been at *Calais* for the purpose of obtaining evidence as to the health and habits of the said Major *Greswolde*; and the Defendant, from that

1836.

STOREY v. Lord GEORGE LENNOX.

that time, by reason of such information considered it possible that the Plaintiffs and the other insurance companies with whom policies had on the Defendant's behalf been effected on the life of Major *Greswolde*, had it in contemplation to dispute their liability to pay the Defendant; wherefore the Defendant, from that time down to the time when he brought his action against the Plaintiff and against the other companies aforesaid, contemplated the bringing actions against them to compel them to pay their several policies, if they should refuse doing so. And the Defendant said that the several letters and papers mentioned and enumerated in the first schedule to the answer annexed, were, and contained information furnished to the Defendant as to evidence which could be procured or given on the Defendant's behalf against the Plaintiffs and the other insurance offices, and that the producing the same or any part thereof to the Plaintiffs, or permitting the Plaintiffs to inspect the same or any of them might disclose the names of the witnesses intended to be examined, and evidence intended to be given on behalf of the Defendant in his action against the Plaintiff, and in the other actions aforesaid, and in the present suit. And the Defendant submitted that he ought not to be compelled to produce any of the letters and papers mentioned and enumerated in the first schedule to his answer annexed. And he further said that exclusive of, and besides the several particulars mentioned and enumerated in the first schedule, he had in his possession or power the several particulars mentioned in the second schedule to his answer, and which he prayed might be taken as part thereof; and he said that save as aforesaid, and excepting the same particulars mentioned and enumerated in the schedules to his answer annexed, he had not, and, to the best of his recollection and belief, never had in his possession

or

1836.

STOREY v. Lord GEORGE LENNOX.

or power, or in the possession or power of his solicitors, or agents, any deed, document, certificate, or certificate of medical men, book, letter, paper, or writing relating to, or touching, or concerning the matters in the bill mentioned, or any of those matters whereby the truth thereof or of any of them would appear.

The papers enumerated in the first schedule to the Defendant's answer consisted, first, of letters written by the Defendant to his solicitors, and to the Defendant by his solicitors, or one of them; secondly, of statements prepared for the opinions of counsel, and the opinions of counsel thereon; thirdly, of various letters, statements, and certificates as to the health of Major *Greswolde*, written and sent to the Defendant by Messrs. *Callow* and *Knott*, surgeon and assistant-surgeon of the regiment, Major *Ratcliffe*, major of the regiment, and other persons not employed by the Defendant as his legal advisers.

No objection was made, on the part of the Defendant, to the production of the papers mentioned in the second schedule.

Mr. *Pemberton*, in support of the motion.

The papers enumerated in the first schedule to the answer are admitted by the Defendant to be in his possession or power, and to relate to the matters in question; and the Plaintiffs, according to all the rules upon which the Court gives a discovery, are entitled to the production of all these papers except such confidential communications between the Defendant and his solicitors as fall within the exception to the general rule, and the opinions of counsel. What is the principle upon which the Court grants a discovery in aid of the defence to an action at law? It is to prevent the Plaintiff at law from taking

1836.

STOREY v. Lord GEORGE LENNOX.

taking an unjust advantage by sifting his conscience, and compelling him to disclose all that he knows, believes, or even suspects, relating to the matter in dispute, so that the truth may be ascertained and justice may be done between the parties. The plaintiff filing a bill of discovery has a right to the disclosure of all matters within the knowledge or belief of the defendant before the institution of the suit, with the single exception of such confidential communications as have passed between the defendant and his solicitors upon the subject of the suit, or in contemplation of it. Such communications are protected from disclosure, not, indeed, upon the mere ground that they are confidential communications — because no communication on the subject of the suit between a father and son, or husband and wife, however confidential, is, privileged — but because it is considered essential to justice that the communications between a man and his legal advisers on the subject of a pending, or contemplated matter of litigation, should be entirely free from all restraint. The reason for the protection ceases as to communications between the defendant and third parties, and no instance, therefore, can be produced in which communications with persons, other than the legal advisers of the Defendant, have been considered as privileged. In the present case it is not pretended that the documents constitute any distinct or separate title of the Defendant, or relate to facts which, from the nature of the action, are not as relevant to the case of the Plaintiff as to that of the Defendant. They are admitted to relate to the matters in question, but it is said that they may disclose the names of the witnesses whom the Defendant intends to examine, and the nature of the evidence he intends to produce. The Defendant does not say that the production of the documents *will*, but that it *may* have that effect. Admit the

1836.

STOREY v. Lord GEORGE LENNOX.

possibility — admit even that this will be the necessary consequence. That is so far from being a reason why the documents should not be produced, that it confirms the right of the Plaintiffs to draw from the Defendant a disclosure of all the facts from which the truth may be ascertained. The Plaintiffs have a right to know from the answer all the facts within the knowledge and belief of the Defendant, and they have a right to know, by the production of all the documents enumerated in the schedule which are not within the admitted exceptions, whether those facts have or have not been truly stated.

Mr. *Kindersley, contrà.*

Recent authorities have established that communications between a client and his solicitor on the subject matter of a suit, pending its progress, or, with reference to it before its commencement, are privileged. *Hughes* v. *Biddulph* (*a*), *Vent* v. *Pacey* (*b*), *Bolton* v. *The Corporation of Liverpool* (*c*). So far, therefore, as this motion extends to such communications, it must clearly fail; for the Defendant distinctly states that he contemplated bringing his action against the Plaintiffs from the time when he obtained information that other companies, similarly situated with the Plaintiffs, intended to resist payment; and when he consequently foresaw the probability of the like resistance on the part of the Plaintiffs. All subsequent communications between the Defendant and his solicitors clearly come within the rule which protects him from discovery. Then comes the question as to communications on the subject of the action between the Defendant and persons not employed by him as his legal advisers. Such communications,

(*a*) 4 *Russ.* 190.
(*b*) *Ibid.* 193.
(*c*) 1 *Mylne & Keen*, 88.

1836.

STOREY v. Lord GEORGE LENNOX.

munications, it is said, have never been protected; but in *Walker* v. *Wildman* (*a*) Sir *John Leach* held that the protection was the same, whether the client communicated directly with his professional adviser, or through the intervention of a third person. And in the late case of *Curling* v. *Perring* (*b*), a motion for the production of correspondence on the subject of the suit between the solicitor of the Defendants, and a person not a party to the suit was refused by the present Lord Chancellor, when Master of the Rolls, who observed that, if the right of inspecting documents were carried to such a length "it would be impossible for a Defendant to write a letter for the purpose of obtaining information on the subject of the suit, without the liability of having the materials of his defence disclosed to the adverse party." It appears, therefore, from these authorities, that, provided the communication have reference to the subject of the suit, it will be equally protected whether the client communicate directly with his solicitor or by the intervention of a third person, or whether information from a third person be sought and obtained by the solicitor, or by the client himself. The ground upon which the Defendant claims protection for these documents, namely, that the production of them would disclose the names of witnesses whom he intends to examine, and evidence which he intends to produce, is precisely that upon which the Court of Exchequer went in refusing the production of documents in *Preston* v. *Carr*. (*c*) But the very case upon which this motion is founded has been already decided in the Court of Exchequer. A similar action to recover the amount of a policy of insurance effected on the life of Major *Greswolde* has been brought by Lord *George Lennox* against the

(*a*) 6 *Mad.* 47.
(*b*) 2 *Mylne & Keen*, 380.
(*c*) 1 *Yo. & Jerv.* 175.

1836.

STOREY v. Lord GEORGE LENNOX.

the *Economical* Life Assurance Company, and that company filed a similar bill of discovery in the Court of Exchequer. (*a*) A motion for the production of the same documents now sought to be produced, was made on the 9th of *July* before Lord *Abinger*, who was of opinion that the plaintiffs in that suit were not entitled to the discovery. (*a*) The Defendant has, therefore, not only all the authorities in analogous cases, but an express decision *in specie* in his favour.

Mr. *Pemberton*, in reply.

The observation of Sir *John Leach* in *Walker* v. *Wildman*, which has been referred to as an authority, was a *dictum* not called for by the circumstances of the case before the Court, and not recognised in any subsequent case. In *Curling* v. *Perring* the letter seeking information from a third party was addressed to that party by the Defendant's solicitor, and not, as in the present case, by the Defendant himself; so that if the Defendant were to succeed in his resistance to the production of these papers, he would succeed in the absence of all authority, except that of the case which is said to have been decided a few days ago by Lord *Abinger* in the Court of Exchequer. If that case were so decided, the decision is contrary to all the principles which govern the law of discovery in this Court. A Plaintiff in a court of equity has a right to sift the conscience of the Defendant, and by the aid of a discovery to possess himself of all the Defendant's knowledge and information which may tend to elucidate the truth of the case. The Defendant can conceal nothing, and the very fact of concealment, or of a desire to withhold information, shews that the withholding of the information

(*a*) *Barber* v. *Lord George Lennox*, not yet reported.

1836.

STOREY v. Lord GEORGE LENNOX.

ation sought to be kept back would give him an undue advantage, which a court of equity will not allow him to take. The case here relied upon by the Defendant is, not that he will produce at the trial all the information, the disclosure of which is resisted, — he does not even pretend that he will do that, — but that the production of the documents may disclose the names of his witnesses, and the nature of the evidence he intends to produce. He asks, therefore, to be permitted to keep the whole information in his pocket, reserving to himself the right of producing that portion of it which may be most favourable to his claim, and of suppressing that which might, and would, according to the allegations of the Plaintiffs, shew that this claim is unfounded and unjust, and not only unfounded and unjust, but known to be so by the Defendant. It is to prevent this possible injustice that a court of equity interposes, by restraining the prosecution of the action until the Defendant in equity shall have made a full disclosure of all the facts within his knowledge or belief; but it is obvious that all the benefit of such interposition would be rendered nugatory, if the Defendant could succeed in his resistance to this motion upon the authority of a single decision, which, upon whatever grounds it may have been made, cannot be reconciled with the principles hitherto recognised in this Court.

The MASTER *of the* ROLLS. *July* 27

The question is whether, under the circumstances of the case, the Defendant is to be protected from the production of these papers, or any of them.

From the mode of proceeding at common law, a man with the full knowledge of facts which would shew the

1836.

STOREY v. Lord GEORGE LENNOX.

truth and justice of the case, may, by concealing those facts within his own breast, and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied, or in resisting a demand which he knows to be just.

This conduct is by courts of equity considered to be against conscience; and they accordingly enable the party in danger of being oppressed by it to obtain from his adversary a discovery of the facts within his knowledge or belief, by filing a proper bill for the purpose; and by the general rule the Defendant to a proper bill of discovery is bound to make a complete disclosure of every thing he knows or believes in relation to the matter in question. According to the general rule he is not to withhold any thing.

Almost every bill of discovery contains, as this bill does, a charge that the Defendant has in his possession or power papers relating to the matter in question, and calls upon the Defendant to set forth, as part of the discovery he is required to make, either the contents of the papers, or a list of the papers, in order to their production; and by the general rule the Defendant is bound to produce (as part of the discovery he is required to make, and to complete his answer, which would otherwise be imperfect) all the papers which he admits to be in his possession, and to relate to the matters in question.

There being no doubt as to the general rule in these cases, the questions which occur arise upon the exceptions; and these I shall not, on the present occasion, consider further than appears to be necessary for the determination of this case.

It

1836.

STOREY v. Lord GEORGE LENNOX.

It has been considered so important that a man should take legal advice, and communicate with his legal advisers freely and without apprehension of consequences hurtful to himself, that it has been held, and is now settled, that he is not bound to disclose the legal advice he may have received, or even the communications which he may have made to his legal advisers in reference to the matters in litigation, either before or after the litigation has commenced. In the case of *Walker* v. *Wildman* (*a*), Sir *John Leach* seems to have thought that the protection against discovery extended to every communication made by a client to his counsel or solicitor for professional assistance; but the proposition to that extent does not appear to have been warranted by former decisions, or to have been acted upon subsequently.

In *Preston* v. *Carr* (*b*), the Court of Exchequer ordered the production of cases laid before counsel for his opinion and advice, touching the contract which was in question in the cause; and Chief Baron *Alexander* stated that he could not accede to the proposition, that the privilege of the attorney is the privilege of the client, to the extent that the client may avail himself of that privilege to avoid discovering communications which have passed between him and his attorney.

In *Hughes* v. *Biddulph* (*c*), before Lord *Lyndhurst*, and in *Garland* v. *Scott* (*d*), before the Vice-Chancellor, the protection was extended only to communications made, either during the progress of a cause, or with reference to it previously to its being instituted.

In

(*a*) 6 *Mad.* 47.
(*b*) 1 *Yo. & Jerv.* 175.
(*c*) 4 *Russ.* 190.
(*d*) 3 *Sim.* 396.

1836.

STOREY v. Lord GEORGE LENNOX.

In *Vent* v. *Pacey* (*a*), where the Defendant had in his possession several letters written by him to his solicitor, the protection was confined to one written, after the dispute had arisen, with a view to taking the opinion of counsel upon the matter in question, which afterwards became the subject of the suit.

In *Bolton* v. *The Corporation of Liverpool* (*b*) the protection was refused as to cases prepared without reference to the existing proceedings, but granted as to cases prepared pending or in contemplation of the existing proceedings, and granted also as to certain documents evidencing the title of the Defendants.

In the case of *Belwood* v. *Wetherall* (*c*) Lord *Abinger* is reported to have said, that he did not think that the order, in *Bolton* v. *The Corporation of Liverpool*, to produce the cases not prepared with reference to the existing proceedings was warranted by the cases which were made the foundation of it, and that he should have decided differently. After consulting all the authorities I have been able to meet with on the subject, I confess that I do not concur in that censure of the case of *Bolton* v. *The Corporation of Liverpool*. I am, indeed, rather of opinion that, consistently with the authorities, the protection against discovery and production might have been confined to narrower limits than it was in that case.

Subsequently to that case, the case of *Curling* v. *Perring* (*d*) occurred in this Court, and the protection was extended to information obtained by the Defendant's

(*a*) 4 *Russ.* 193.

(*b*) 3 *Sim.* 467. and 1 *Mylne & Keen*, 88.

(*c*) 1 *Younge & Collyer*, 219.

(*d*) 2 *Mylne & Keen*, 380.

ant's solicitors from a person, not a party to the suit, after the dispute had commenced, and in reference to the subject.

It is manifest that the protection against discovery, which is afforded in these cases, is founded on the necessity, or supposed necessity of exempting a party litigant, or contemplating litigation, from all restraint or apprehension of consequences in his employment of, or communication with his legal agents in relation to the matter in dispute.

Sir *John Leach* in *Walker* v. *Wildman* considered, and I conceive correctly, that the protection would extend to the case in which the client communicated with the professional adviser through the intervention of a third person. If such third person were an interpreter there could be no doubt. Lord *Cottenham* in *Curling* v. *Perring* extended it, as I have said, to the case in which information was obtained by the solicitor from a third person. But I am not aware of any instances in which the protection, on the ground of confidence, has been extended to communications with, or information obtained from any person otherwise than in communication with, or by the agency of the professional adviser.

And in the case of *Greenhough* v. *Gaskell* (*a*) (in which however the information was sought from the solicitor himself, and not from the party) Lord *Brougham*, who had decided the case of *Bolton* v. *The Corporation of Liverpool* in conformity with the opinion of the Vice-Chancellor, addressing himself to the subject says, "that the party himself cannot be compelled to disclose his own

(*a*) 1 *Mylne & Keen*, 100.

1836.

STOREY v. Lord GEORGE LENNOX.

own statements made to his counsel or attorney in the suit pending, or with reference to that suit when in contemplation. But he has no general privilege or protection; he is bound to disclose all he knows, and believes and thinks, respecting his own case, and the authorities therefore are, that he must disclose also the cases he has laid before counsel for their opinion, unconnected with the suit itself." And again (*a*) "to compel a party himself to answer upon oath, even as to his belief or thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery for such communications are not necessary to the conduct of judicial business, and the defence, or prosecution of men's rights by the aid of skilful persons."

In applying the rule to be collected from the authorities to the present case, we must therefore distinguish the statements for the opinions of counsel, and the letters from the solicitor, from the other papers.

With respect to the statements for the opinion of counsel, I think that the protection of the Defendant from their production depends on the question, whether having regard to the circumstances of this case, they are to be considered as having been made with reference to the proceedings afterwards instituted against the Plaintiffs.

The circumstances are these: the claim of the Defendant arose on the death of Major *Greswolde*. At the same time, the Defendant acquired claims of precisely the same kind on other insurance offices. He soon afterwards heard that inquiries were on foot respecting the

(*a*) 1 *Mylne & Keen*, 101.

the health and habits of Major *Greswolde*. He does not say that these inquiries were instituted by the Plaintiff, but by some or one of the companies; the Plaintiffs might be among them. In consequence of the information he received, he says he considered it possible that the Plaintiffs, and the other persons who had granted policies, would dispute his claims; and he contemplated bringing actions to compel them to pay if they refused.

He certainly has not said that either the statements for the opinions of counsel, or the letters of his solicitor were prepared or written in reference to his action against the Plaintiffs; but I think the fair inference from the expressions he has used is, that the statement and solicitors' letters were prepared, and written, not exclusively with reference to the Defendant's proceedings against the Plaintiff, but with reference to them in connection with proceedings contemplated against other parties; and on that ground I think that, upon the authority of the cases I have mentioned, the Defendant is not bound to produce those statements and letters.

But the other letters mentioned in the schedule, and for which protection is also sought, are letters addressed to the Defendant personally, by persons with whom it does not appear that he stood in any confidential relation whatever; and I am of opinion that the Defendant is not, on any ground of confidence or confidential relation, entitled to be protected from the production of those letters, or any of them, or the certificates mentioned in the schedule.

But as to these, as well as the other documents, the Defendant says that they are, and contain information furnished to the Defendant, as to evidence which can be produced or given on the Defendant's behalf against the

1836.

STOREY v. Lord GEORGE LENNOX.

the Plaintiffs, and the other insurance offices, and that the producing them or any of them to the Plaintiffs, or permitting the Plaintiffs to inspect them, or any of them, might disclose the names of witnesses intended to be examined, and evidence intended to be given, on behalf of the Defendant, in the action of the Defendant against the Plaintiff, and in the other actions; and it is added, in the present suit, in which, this being a bill of discovery only, no evidence can be given.

In the case of *Preston* v. *Carr* (*a*) the plaintiff sought the production of letters which the defendant in his answer stated to contain information he sought for after the commencement of his action, as to the evidence which he could adduce at the hearing of the cause, and as to the evidence which would be given by the writers of the letters in the particulars therein mentioned; and the defendant submitted that he was not bound to produce them, because they would disclose the names of his witnesses, and to some extent the nature of his proofs, and because they did not contain any information in support of the Plaintiff's case, so far as the same was opposed to the answer. Chief Baron *Alexander*, in giving his judgment, without pledging himself to the precise rule, contented himself with saying that in that case he considered the Plaintiff not entitled to a production of the letters from the witnesses, or their statements, or to be furnished with the names of the witnesses.

This case is very different from that of *Preston* v. *Carr*. The letters here are not in answer to inquiries instituted after the commencement of the action as to the evidence which the Defendant can adduce at the hearing,

(*a*) 1 *Yo. & Jerv.* 175.

1836.

STOREY v. Lord GEORGE LENNOX.

ing, or as to the evidence which may be given by the writers of the letters, and it is not sworn that they contain no information in support of the Plaintiff's case, so far as the same is opposed by the answer.

The defence here is, that the letters may disclose the names of the witnesses, and the evidence; and so indeed may every discovery which the Defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the Plaintiff that which may enable the Plaintiff to learn the names of the witnesses, and the nature of the evidence; and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the courts of equity would be lost. It occurs constantly to ask the Defendant when, where, and in whose presence, particular transactions took place; he must answer, and cannot protect himself by saying that to tell in whose presence the transaction took place, would disclose the names of his witnesses. And I am of opinion, that in this case the Defendant cannot protect himself from producing the letters in question, because the names of his witnesses and some of his evidence may be incidentally disclosed.

Let the Defendant produce the letters, papers, and writings mentioned and enumerated in the first schedule, other than the letters written to him by, or by him to, his solicitors or either of them, and the statements prepared for the opinions of counsel, and the opinions of counsel.

This decision was appealed from, and affirmed by the Lord Chancellor. (*a*)

(*a*) 1 *Mylne & Craig*, 525.

1336.

July 27.
Aug. 4.

STANTON *v.* HATFIELD.

Where in a creditor's suit a fund had been realized by the diligence of the Plaintiff, and the assets were more than sufficient for payment of the debts, the costs of the Plaintiff as between party and party were ordered to be paid out of the general fund, and the extra costs of the Plaintiff were, under the circumstances directed to be paid *pro ratâ* by all the creditors who partook of the benefit of the suit.

THIS was a suit by a simple contract creditor, on behalf of himself and all other the creditors of the testator *John Tillotson*, against the Defendant *Hatfield*, who was executor and trustee under the will of the testator, and against the several parties interested under the will. The assets of the testator consisted chiefly of a freehold house, which was devised upon trust for sale and for payment, in the first place, of the testator's debts. It appearing by the answer that the Defendant *Hatfield* had conveyed the freehold house to a person of whom he had afterwards repurchased it, a supplemental bill was filed for the purpose of having the sale and repurchase set aside, and by the decree made at the hearing it was declared that such sale and repurchase were fraudulent and void, and the Defendant *Hatfield* was ordered to pay so much of the costs of the suit, as between party and party, as had been incurred in setting aside the fraudulent purchase; and the usual accounts were directed to be taken. In the result, the produce of the testator's estate was sufficient to pay his debts and legacies, and to leave a surplus for the residuary legatee.

On the cause coming on for further directions,

Mr. *Pemberton*, and Mr. *Roupell*, for the Plaintiff, submitted that under the special circumstances of this case, the Plaintiff ought to be allowed his costs, as between solicitor and client, out of the fund which had been almost entirely realised by the diligence, and at the

the risk of the Plaintiff. If the Plaintiff were allowed only costs between party and party, the extra costs would absorb his whole debt, and while the other creditors, and the residuary legatee, reaped the benefit of his successful proceedings against the fraudulent executor, he alone would be a loser. It had, no doubt, been laid down that, in a creditor's suit, it was only where the fund was insufficient for the payment of debts, that costs were allowed to the plaintiff as between solicitor and client: *Tootal* v. *Spicer* (*a*), *Brodie* v. *Bolton.* (*b*) But the rule could scarcely be considered as fully established; and if it were, this was not a mere creditor's suit, but there were specialties in the case which were sufficient to take it out of the general rule. The greater part of the costs had been directed to be paid by *Hatfield*, against whom the fraud was established, so that the estate had not borne the costs, and the Plaintiff was, upon every principle of justice, entitled to be indemnified out of the estate. In *Lechmere* v. *Brazier* it was held by Lord *Gifford*, and affirmed upon appeal by Lord *Eldon*, that the Plaintiffs, who were creditors by simple contract, were not entitled to contribution in respect of their extra costs from the specialty creditors, who had come in and swept away the whole fruit of the suit, the fund being in that case insufficient to pay the specialty creditors. In *Young* v. *Everest* (*c*) and in *Rowlands* v. *Tucker* (*d*) Sir *John Leach* refused to Plaintiffs under similar circumstances even their common costs. To those decisions of Sir *John Leach* were opposed the cases of *Larkins* v. *Paxton* (*e*) and *Barker* v. *Wardle.* (*g*) There appeared, therefore, to have been sufficient fluctuation in the decisions, to justify the Court in relaxing the

(*a*) 4 *Sim.* 510.
(*b*) 3 *Mylne & Keen*, 168.
(*c*) 1 *Russ. & Mylne*, 426.
(*d*) 1 *Russ. & Mylne*, 635.
(*e*) 2 *Mylne & Keen*, 320.
(*g*) *ibid.* 818.

1836.

STANTON v. HATFIELD.

the rule in a case where it would be most unreasonable that the burthen of the extra costs should be thrown upon the Plaintiff by those who had reaped the benefit of the suit.

Mr. *Tinney* and Mr. *Chandless*, *contrà*, insisted that the rule was fully established that, where the fund was sufficient for the payment of debts, the Plaintiff in a creditor's suit was entitled only to his costs as between party and party, and had no right to diminish the fund of the parties entitled to the surplus.

The MASTER *of the* ROLLS said that, if he were at liberty in this case to give the Plaintiff his costs out of the fund as between solicitor and client, he should be much disposed to do so. In *Shortley* v. *Selby* (*a*) the rule had been laid down that, if the Plaintiff in a creditor's suit did not demand contribution at the time when it was competent to him to do so, namely, when the creditors came in to prove their debts, he lost the benefit of the condition upon which, according to the form of the decree, other creditors, not parties, are admitted to prove their debts. In *Bluett* v. *Jessop* (*b*), where the question was raised, whether the Plaintiff in a creditor's suit was not entitled to contribution from the creditors who had come in to prove their debts, Sir *Thomas Plumer* said, he believed that in practice such a thing had never been done. In *Lechmere* v. *Brazier* (*c*) the point came directly under consideration of the Court. That was a suit instituted by simple contract creditors. Under the usual decree, two specialty creditors came in and proved a large demand. Costs of the suit, as between party and party, were paid out of the general fund, without any dispute or controversy: what remained

(*a*) 5 *Mad.* 447. (*b*) *Jac.* 240. (*c*) 1 *Russ.* 72.

1836.

STANTON v. HATFIELD.

mained was insufficient for payment of the specialty creditors. The Plaintiff's solicitor, having received payment of his costs taxed between party and party, and having in his possession the order by which alone the fund could be obtained out of Court, refused to allow the specialty creditors the use of the order, unless they paid him the extra costs, although the fund in Court belonged to the specialty creditors. Lord *Gifford* was of opinion that the claim could not be sustained; and his decision was affirmed, upon appeal, by Lord *Eldon*, who intimated, however, in his judgment, that the rule which exempted creditors, not parties to the suit, from contributing to the extra costs of the Plaintiff operated with some hardship.

The point, however, did not appear to be settled, for in the case of *Barker* v. *Wardle* (*a*), the Plaintiffs (simple contract creditors) were allowed their costs as between solicitor and client out of the fund in Court, which was insufficient to pay the specialty creditors in full; and his Lordship said, he should be glad if creditors, not parties to the suit, who came in to reap the benefit of it, could be compelled to contribute to the payment of the Plaintiff's extra costs; and he would consider, whether an order for that purpose could properly be made in this case.

Aug. 4.

On a subsequent day, his Lordship said that, under the circumstances of this case, he should direct the costs of the Plaintiff as between party and party to be paid out of the fund, and the extra costs of the Plaintiff to be paid *pro ratâ* by all the creditors who partook of the benefit of the suit; and he had framed an order for that purpose. His Lordship read the following order: — Let

(*a*) 2 *Mylne & Keen*, 818.

1836.

STANTON v. HATFIELD.

Let the costs of the Plaintiff be taxed as between solicitor and client, and also as betweeen party and party, and let the Master ascertain the difference. Let the costs of the Plaintiff as between party and party be paid out of the general fund. Out of the remaining fund let the Master set apart a sum equal to the amount of the debts, to be called the creditors' fund. Let the difference between the Plaintiff's costs as between solicitor and client, and his costs as between party and party, be deducted from and paid out of the creditors' fund; and let the Master apportion the remainder of that fund among the creditors, including the Plaintiff, in proportion to the amount of their respective debts.

Dec. 20.

BODDY *v.* DAWES.

The testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one; and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal, as therein mentioned:

Held, that the grandchildren were entitled to the interest during their minority.

HENRY DAWES made his will, dated the 31st of *January* 1827, in the following words:—"After my just debts and funeral expenses are paid, I give unto my executor and the trustees hereinafter named the sum of 10,000*l.* stock in the 3½ per cent. annuities in trust for the following purposes; that is to say, I give to Mr. *John Marlett Boddy* the interest arising from the sum of 2500*l.* of the above-named stock for and during the term of his natural life, and from and after his decease I hereby give and bequeath the aforesaid sum of 2500*l.* to be equally divided amongst the children of my late daughter, *Jane Maria Boddy*, or their descendants;

ants; but should there be none of them surviving, then my mind and will is that the said sum be equally divided amongst such other grandchildren as I may then have living, or in default thereof, to my legal representatives; and I hereby give to my grandson, *Henry Dawes Boddy*, the sum of 2500*l.* of the above-named stock; and to my grand-daughter, *Georgiana Maria Boddy*, the sum of 1500*l.* of the above-named stock; and to my grand-daughter, *Amelia Jane Boddy*, the sum of 1500*l.* of the above-named stock; and to my grandson, *George Frederick Boddy*, the sum of 2000*l.* of the above-named stock, on my above-named grandchildren respectively attaining the age of twenty-one years; but should any of my said grandchildren die before the age of twenty-one years, then my mind and will is that their portion be equally divided amongst those of my said grandchildren who shall attain the age of twenty-one years; but should the whole of my said grandchildren die before attaining the age of twenty-one years, then my mind and will is that the interest arising from the above-named sum be enjoyed by the said *John Marlett Boddy* for and during his natural life, and from and after his decease then the principal to be divided amongst such other grandchildren as I may then have living, or in default thereof, then to my legal representatives; and I hereby give and bequeath all the rest and remainder of my property not hereby devised, real and personal, of whatever nature or kind it may be, unto my son *Henry John Dawes*, his heirs, executors, and assigns, for ever; and I do hereby appoint my said son *Henry John Dawes* my sole executor; and for the carrying of the above-named trusts into execution, I do hereby appoint my said son *Henry John Dawes*, together with *Thomas Greenwood* and *William Spencer*, trustees for the purposes hereinbefore named.

1836.
BODDY
v.
DAWES.

The testator died, leaving the Plaintiffs, his grandchildren named in the will, who were all infants, and *John Marlett Boddy*, their father, surviving him; and the question in the cause was, whether the infants were or were not entitled to maintenance.

Mr. *Tinney* and Mr. *Seton*, for the Plaintiffs.

The legacy to the grandchildren being contingent upon their respectively attaining the age of twenty-one, the infants will not be entitled to maintenance unless the case falls within the exceptions to the general rule, and it is submitted that it does fall within those exceptions. One of the exceptions is, where the legacy is from a parent, or from a person who has placed himself *in loco parentis*, to a child. In *Acherley* v. *Wheeler* (*a*), where the testator, by a codicil, directed that the portion of 1000*l*., given by his will to his niece, should be increased to 6000*l*., and be payable to her at her age of twenty-one, or marriage, the Court held that, though the actual payment was stopt until twenty-one or marriage, it was, however, vested presently, and being severed from the residue, the interest could belong only to the testator's niece; and such interest, from the death of the testator, was decreed accordingly. In *Heath* v. *Perry* (*b*) Lord *Hardwicke*, alluding to the grounds of Lord *Macclesfield*'s judgment in *Acherley* v. *Vernon*, observes that the testator, in that case, "put himself in the place of a parent, for she was the daughter of his only sister, and he calls it a *portion*; therefore there were strong grounds to take it as vested." In the present case the testator directs that if any of his grandchildren should die before the age of twenty-one years, their *portion* should be equally divided among those who should attain

(*a*) 1 *P. Wms.* 783. (*b*) 3 *Atk.* 101.

1836.
BODDY v. DAWES.

attain twenty-one. In *Crickett* v. *Dolby* (*a*) Lord *Alvanley* says, the rule is clear that a legacy, whether vested or not, does not bear interest till the time of payment, except in the case of parent, or person *in loco parentis*, and child; and he observes that *Acherley* v. *Wheeler* was determined upon the idea that the testator put himself *in loco parentis*. Now the present case is stronger in favour of the exception than *Acherley* v. *Wheeler*, because there the relation was that of uncle and niece, whereas here it is between grandfather and grandchildren.

The next circumstance is, that the fund out of which the legacy is given is separated from the general residue of the testator's estate; a circumstance which also occurred in *Acherley* v. *Vernon*, and which is relied upon by Lord *Macclesfield* in his judgment. Thirdly, the fund out of which the legacy is payable is given immediately to the trustees; and, as it will scarcely be contended that the testator intended the trustees to retain the intermediate interest for themselves, the inference is that it is applicable to the benefit of the infants. That inference is further strengthened by the consideration that, in the event of all the grandchildren named in the will dying under twenty-one, there is a gift over of the interest to the father, and of the principal, after the decease of the father, to such other grandchildren as the testator might then have. The father, in a certain event, is to enjoy the "interest arising," that is to say, the future interest, during his life, and the persons entitled in remainder are to take the principal; it follows, therefore, by an almost necessary implication, that the grandchildren named in the

(*b*) 3 *Ves.* 10.

1836.

BODDY v. DAWES.

the will were intended to enjoy the interest during their lives. In *Brown* v. *Temperley* (*a*), where the testator gave all his residuary estate, which consisted chiefly of real estate, to trustees, for such of his children as should attain twenty-one, or marry with consent of their guardian, the Master of the Rolls held that the children were entitled to maintenance during their minorities, although their interests were contingent. That was a case between parent and child; but in *Ex parte Bowden* (*b*), where the testator gave to each of his daughters the sum of 5000*l.* to be placed in the 3 per cents., the interest of which was to be for their separate use, and if any of them should die leaving children, the *principal* to be divided between them if they should attain twenty-one, and if they had no children, *it* was to be divided between the surviving sisters, the present Lord Chancellor, when Master of the Rolls, decided that the children of a deceased daughter were entitled to the interest of their mother's share during their minorities.

Mr. *Pemberton* and Mr. *Parker*, *contrà*.

There is no weight in any of the arguments by which it is attempted to take this case out of the general rule. The word "portion" in this testator's will evidently means the *share* of the deceased grand-daughter, and is used, therefore, in a totally different sense from that which is said to have given to it so much importance in the case of *Acherley* v. *Wheeler*. The rule is, with the single exception of the case of parent and child, that interest, unless expressly given, can never be allowed upon a contingent legacy, and why? Because interest is

(*a*) 3 *Russ.* 263. (*b*) Rolls, *Nov.* 27th, 1835.

is the fruit of property which a man possesses, and cannot, unless by the express provision of the donor, be payable out of property which may never be his. To say that the interest is given over, is to assume that there is an express bequest of the interest till the grandchildren attain twenty-one; and it is admitted that there is no such express bequest. The interest, during the minority of the grandchildren, is not disposed of, and passes under the general residuary clause. Even in a case between parent and child, the Court will not direct the interest of a contingent legacy to be applied for the child's maintenance, unless the parent is totally incapable of maintaining it. *Butler* v. *Butler*. (*a*) In *Kine* v. *Wellfit* (*b*) the Vice-Chancellor refused to allow maintenance out of the residue to the testator's infant children, although the legatees over consented to the application; and where the disposition of the property was not such as that the testator's grandchildren would, of necessity, take the whole fund, the same Judge refused an increase of the maintenance provided by the testator. *Turner* v. *Turner*. (*c*)

Mr. *Tinney*, in reply.

Admitting that the word "portion" is capable of different interpretations, why should the infants be denied the benefit of that construction which it is impossible to say may not be the true one? The Court always inclines to favour maintenance, and will gladly lay hold of any circumstances which may enable it to mitigate the severity of the general rule.

The

(*a*) 3 *Atk.* 58.
(*b*) 3 *Sim.* 533.
(*c*) 4 *Sim.* 430.

1836.

BODDY v. DAWES.

The MASTER *of the* ROLLS.

The testator, by giving the legacy to his executor and trustees, has separated the 10,000*l.* 3½ per cent. stock from the general residue of his estate. He has given the interest arising from 2500*l.*, part of the whole legacy, to *John Marlett Boddy* for his life; the remainder of the 10,000*l.* he has given in different shares to his grandchildren named, on their respectively attaining the age of twenty-one years, and has not, in terms, disposed of the interest during their minorities; but he has directed that if they all die before attaining twenty-one years of age, the interest "arising," not the interest which has arisen, from the whole legacy shall be enjoyed by *John Marlett Boddy*, during his life. The question is, whether he has disposed of the interest during the minorities of the legatees. There is weight in the argument that the word "portion" in this will may have been used only in the sense of "part or share;" but it may have been used in a sense more favourable to the grandchildren; and looking at the whole of this will, it appears to me to afford a reasonable inference that the testator intended to give the intermediate interest to the grandchildren, who were to take the principal on their attaining the age of twenty-one years.

1836.

BULLIN *v.* FLETCHER.

Dec. 5. 7.

A testator entered into a contract for the purchase of an estate, by which the vendor agreed to convey the same to the purchaser, his heirs, appointees, or assigns. Subsequently to the contract he made a codicil to his will, by which, after reciting the contract, he devised the purchased estate to his executors and trustees upon the trusts therein mentioned. He afterwards took a conveyance from the vendor to the usual uses to bar dower:

Held, that the conveyance operated as a revocation of the devise.

BY articles of agreement, dated the 5th of *October* 1832, between *Samuel Thompson* of the one part, and *Edward Cearns* of the other part, *Samuel Thompson* agreed to sell to *Edward Cearns* the freehold premises, therein described, at the rate of 710*l.* for every 10,240 superficial yards. And it was agreed that *Samuel Thompson* or his heirs and all other necessary parties should, on or before the first day of *February* following, receiving the purchase-money from the said *Edward Cearns*, his executors or administrators, execute at the costs and charges of *Edward Cearns*, his heirs, executors, administrators, and assigns, a proper conveyance for conveying and assigning the fee-simple and inheritance of the said hereditaments and premises, with their appurtenances, unto the said *Edward Cearns*, his heirs, appointees, or assigns, free from all incumbrances; with the usual and proper covenants, according to the circumstances of the title, for title, and for quiet enjoyment, and for further assurance.

Edward Cearns had, at the date of the agreement, made his will; and by a codicil to his will, duly attested to pass freehold estates, dated the 8th of *October* 1832, after reciting that, since the execution of his will, he had contracted with *Samuel Thompson* for the purchase of the above-mentioned estate, he gave and devised the land and hereditaments, so contracted for by him as aforesaid, unto the Plaintiffs, their heirs and assigns, upon trust, that they, and the survivors, &c. should sell and dispose of the same lands and hereditaments, and

1836.

BULLIN v. FLETCHER.

and upon further trust to apply the produce of such sale in the manner therein mentioned.

The purchase-money of the estate, which *Edward Cearns* had contracted to purchase, amounted to the sum of 8830*l.*, and by indentures of lease and release, dated respectively the 10th and 11th of *April* 1833, and made between *Samuel Thompson* of the first part, *Joseph Thompson* of the second part, *Edward Cearns* of the third part, and *James Lowe* of the fourth part, reciting the contract, and that *Edward Cearns* was desirous that the purchased estate should be conveyed to the uses thereinafter mentioned, it was witnessed that, for the considerations therein mentioned, *Samuel Thompson* did appoint that the said lands and hereditaments should thenceforth be and remain to the uses, upon the trusts, and for the interests and purposes therein declared concerning the same; and it was further witnessed that the said *Joseph Thompson*, according to his estate and interest, and by direction of *Samuel Thompson*, did bargain, sell, and release, and *Samuel Thompson* did grant, bargain, sell, release, and confirm unto the said *Edward Cearns*, and his heirs, the said land and hereditaments, to hold the same unto *Edward Cearns* and his heirs for ever; nevertheless to such uses, upon such trusts, and for such interests and purposes, and charged and chargeable in such manner and form as *Edward Cearns* should at any time and from time to time, by any deed or deeds, with or without power of revocation, direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, to the use of the said *Edward Cearns* and his assigns during the term of his natural life, without impeachment for any manner of waste; and immediately after the determination of that estate by any means in his lifetime, to the

the use of the said *James Lowe*, his executors or administrators, during the natural life of *Edward Cearns*, in trust for him and his assigns; and from and after the expiration or sooner determination of the estate thereby limited, then to the use of the said *Edward Cearns*, his heirs and assigns, for ever.

Edward Cearns died in the month of *June* 1834, leaving the Defendant *Edward Cearns* his only son and heir at law. The will and codicil were duly proved by the Plaintiffs, the executors and trustees named in the will and codicil by the testator.

In the month of *January* 1835 the Plaintiffs entered into a contract with the Defendant *John Fletcher* for the sale of the estate devised by the codicil. The completion of the contract was resisted by the purchaser on the ground that a good title could not be made to the estate, and the bill was filed by the Plaintiffs against the purchaser and the heir at law of the testator for the purpose of compelling the specific performance of the agreement.

The question in the cause was, whether the conveyance of the 10th and 11th of *April* 1833 operated as a revocation of the devise made by the codicil.

Mr. *Spence* and Mr. *Koe*, for the Plaintiffs.

It is settled that, where a person devises an estate of which he is the equitable owner, and afterwards takes a conveyance of the legal estate, this operates no revocation of the devise, because the taking of a conveyance which merely clothes the equitable with the legal estate neither changes the subject of the devise, nor indicates any alteration in the intention of the

1836.

BULLIN v. FLETCHER.

the testator: *Parsons* v. *Freeman.* (*a*) It has been held, indeed, in the case of *Rawlins* v. *Burgis* (*b*), that a devise of a freehold estate contracted for, there being no stipulation in the contract except for a conveyance in fee-simple, is revoked by a subsequent conveyance to the usual uses to bar dower, but that decision has never been approved by conveyancers. Sir *Edward Sugden* in his *Vendors and Purchasers* (*c*) says that an appeal, which was brought from that decision, was for peculiar reasons withdrawn, and that the point involved in it is one of great interest and nicety. In *Ward* v. *Moore* (*d*), a subsequent conveyance to uses to bar dower was held by Sir *John Leach* to be a revocation of the devise of an estate contracted for, even where the contract was by parol; but in that case the conveyance made subsequently to the devise was to the purchaser and another person in trust for the purchaser; and though the name of that other person was introduced into the conveyance merely for the purpose of barring dower, yet the introduction of a trustee as joint-tenant was held to be an essential modification of the equitable estate which the purchaser was entitled to under the contract, and, consequently, to operate as a revocation. There being no stipulation as to the form of the conveyance, and the form resorted to being one of the common devices for barring dower, the conveyance was such as the purchaser had a right to require under the contract, and the soundness of the decision has been much doubted. Sir *Edward Sugden* observes, that if it were stipulated, in a contract for the purchase of an estate, that the estate should

(*a*) 3 *Atk.* 741. *S. C.* 1 *Wils.* 308. and *Ambl.* 116.

(*b*) 2 *V. & B.* 382.

(*c*) Vol. i. p. 179. 9th edit.; and see the *Treatise on Powers*, vol. ii. p. 6. 6th edit., where Sir *E. Sugden* examines the cases of *Rawlins* v. *Burgis*, *Ward* v. *Moore*, and *Brain* v. *Brain*.

(*d*) 4 *Mad.* 368.

1836.

BULLIN v. FLETCHER.

should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower would not, in his opinion, operate as a revocation of the devise. (*a*) Now, in the present case, it is expressly stipulated in the contract that the vendor shall execute a proper conveyance for conveying, and assigning the fee-simple and inheritance of the estate to the purchaser, his heirs, appointees or assigns, free from incumbrances. It is clear that a limitation to such uses as the purchaser shall appoint comes within the meaning of the word appointees; the contract is, therefore, to that extent at least, well executed by the introduction, in the conveyance, of the usual uses to bar dower. The interposed estates to the purchaser for his life, and to a trustee during the life of the purchaser, in case of the determination of that estate by forfeiture or otherwise, cannot be said to alter the nature of the conveyance for which the purchaser contracted, because, if such limitations had not been introduced, the legal estate under the conveyance would not have corresponded with the equitable estate which the purchaser had under the contract. If the purchaser had died seised of his equitable estate, his widow would not have been entitled to dower. The introduction of the uses to bar dower, therefore, in the conveyance is so far from creating any difference in the equitable and legal estates, that it was actually necessary in order to make the legal estate correspond with the equitable in respect of the exclusion of dower.

Mr. *Turner*, for the purchaser.

The Plaintiffs are not in a situation to make a good title to this property. *Rawlins* v. *Burgis* (*b*) is an express

(*a*) *Vendors and Purchasers, ubi suprà.* (*b*) 2 *V. & B.* 382.

1836.

BULLIN v. FLETCHER.

express authority in support of the proposition, that the taking of a conveyance to uses to bar dower is a revocation of the devise of an estate for the purchase of which the testator has contracted without stipulating for the form of the contract, and that authority has been followed in *Ward* v. *Moore* (*a*), and confirmed by *Brain* v. *Brain*. (*b*) These cases are founded upon *Tickner* v. *Tickner* (*c*), and *Kenyon* v. *Sutton* (*d*); and proceed upon the principle, that the introduction of a power of appointment in a conveyance, taken by the purchaser subsequently to the devise of the purchased estate, so alters the character of the subject of devise, as to amount in point of law to a revocation. However the writers of text-books may have dissented from this doctrine, the principle is now too firmly settled to be shaken.

The only question is, therefore, whether this case can be distinguished from those which have been decided upon this point, by reason of the introduction of the word "appointees" in the contract for the purchase of the estate. If that word is to be taken to mean nominees, or persons appointed before the execution of the conveyance, then it is clear that there has been no conveyance to such nominees. If it mean that the conveyance shall contain a power of appointment, how would the Court execute such a contract? It is settled by the decision of Lord *Eldon* in *Maundrell* v. *Maundrell* (*e*), which has removed all the doubt which once existed, whether the power could subsist with the fee, and which has governed the practice of conveyancers upon this point, that the proper

(*a*) 4 *Mad.* 368.

(*b*) 6 *Mad.* 221.

(*c*) Cited in *Parsons* v. *Freeman*, 3 *Atk.* 741.

(*d*) Cited in *Williams* v. *Owen*, 2 *Ves.* jun. 601., and *Harmood* v. *Oglander*, 6 *Ves.* 207. and 8 *Ves.* 115.

(*e*) 10 *Ves.* 246.

1836.

BULLIN v. FLETCHER.

proper form of conveyance would be to such uses as the purchaser should appoint, and in default of appointment to the purchaser in fee. In either case, therefore, the legal estate actually conveyed differs so much from the equitable estate to which he was entitled under the contract, that, according to all the authorities, the devise of that equitable estate was revoked.

Mr. *Pemberton* and Mr. *T. Turner*, for the infant heir.

The word "appointees," according to its plain import, must mean persons already appointed by the purchaser at the date of the conveyance, and not persons whom the purchaser should thereafter appoint. A conveyance in fee implies and includes the power of making any disposition of the estate which the owner of the fee may think proper; the word "appointees," therefore, is merely *expressio eorum quæ tacite insunt*, and can have no operation. Now it is admitted that, but for that word, the conveyance to uses to bar dower would, according to all the authorities, operate as a revocation of the devise. But then it is said that the decisions are against principle, and disapproved by eminent conveyancers; that, if the purchaser had died seised of his equitable estate, his widow would not have been entitled to dower, and that the uses to bar dower were necessary to make the legal estate correspond with the equitable. That argument proceeds upon the erroneous assumption that a contract for the purchase of an estate, where there is no express stipulation as to dower, or as to the form of the conveyance, implies the exclusion of dower in the legal conveyance; in other words, that because by an anomaly for which no reason can be given, the wife was excluded (until a recent statute (*a*)) from dower out of her husband's equitable estate, she must necessarily

(*a*) 3 & 4 *W.* 4, *c.* 105. *s.* 2.

1836.

BULLIN v. FLETCHER.

sarily be excluded from dower when his equitable is converted into a legal estate.

Mr. *Spence*, in reply.

The word "appointees" is as correctly applied to persons whom the purchaser should appoint after the date of the conveyance, as the word "assigns" is to persons to whom he should thereafter assign his interest. Appointees are distinguished from assigns, and it is clearly intended that a power of appointment should be introduced in the conveyance. If that be so, the uses to bar dower are in conformity with an express term in the contract; and there is no difference between the equitable estate which the purchaser took under the contract, and the legal estate afterwards conveyed. The word "appointees" entirely distinguishes this case from *Rawlins* v. *Burgis* and *Ward* v. *Moore*, and brings it within the circumstances under which, according to the opinion of Sir *Edward Sugden*, a conveyance to uses to bar dower would not operate as a revocation.

Dec. 7. *The* MASTER *of the* ROLLS.

In this case *Edward Cearns*, having contracted to purchase the estate in question, made a codicil to his will, and thereby, after reciting the contract, devised the purchased estate to the Plaintiffs. Some time afterwards the legal estate was conveyed to him or for his benefit; and the question is, whether the conveyance operated as a revocation of the devise.

Where a man, having contracted for the purchase of lands, devises them, and then takes a conveyance which merely clothes the equitable estate with the legal title, it

1836.

BULLIN v. FLETCHER.

it is clear that by such conveyance the devise of the equitable estate is not revoked. But if the conveyance is so framed that the legal estate acquired subsequently to the devise is modified differently from the equitable estate possessed at the time of the devise, there is a revocation; and, in this class of cases, we have to compare the equitable estate possessed prior to the devise with the legal estate obtained afterwards. The nature of the equitable estate is to be collected from the contract; the nature of the legal estate from the conveyance.

By the contract, the testator was entitled to a conveyance to him and his heirs, appointees, or assigns, free from all incumbrances. It is disputed what is the effect of the word "appointees" in the contract. Did it mean such persons as the testator might nominate or appoint previously to the conveyance, or such persons as the testator might nominate or appoint at any time subsequently to the conveyance? If the former, the testator had a mere equitable estate in fee-simple; if the latter, the contract involved a direction that the conveyance should be so framed as to give the testator a power of appointing to uses.

The conveyance was, in fact, to the testator and his heirs for ever, nevertheless to such uses, and upon such trusts, and for such interests and purposes, and charged and chargeable in such manner and form as the said testator should, at any time or from time to time, by any deed or deeds, with or without power of revocation, direct or appoint; and in default of any such direction or appointment, and so far as any such direction or appointment should not extend, to the use of the said testator and his assigns during the term of his natural life, without impeachment for any manner of waste; and immediately after the determination of that estate by any

1836.

BULLIN v. FLETCHER.

means in his lifetime, to the use of *James Lowe*, his executors or administrators, during the natural life of the said testator, in trust for him and his assigns; and from and after the expiration or sooner determination of the estate thereby limited, to the use of the said testator, his heirs and assigns, for ever.

If the testator had an equitable estate in fee-simple under the contract, the will is revoked, according to the several cases of *Tickner* v. *Tickner*, *Kenyon* v. *Sutton*, *Rawlins* v. *Burgis*, and *Brain* v. *Brain*. If the effect of the word "appointees" involved a direction that the conveyance should contain a power of appointment, a revocation would not have been the consequence of introducing such a power; but a simple power of appointment, and a direction that, in default of appointment, the estate should go to the testator and his heirs, would have satisfied the contract, and is all that seems to be incident to the contract in this sense; and the limitation to the testator for life, with remainder to *James Lowe* for life in trust for the testator, is, I think, a modification different from and not incident to the equitable estate possessed under the contract, and is for that reason a revocation of the devise.

It appears to me, therefore, that, whatever effect may be attributed to the word "appointees" in the contract, the conveyance is so framed as to revoke the devise.

It is very probable that this result defeats the intention; but the effect of an alteration in the estate is wholly independent of intention, and sometimes, as Sir *Thomas Plumer* observes (*a*), violates the intention clearly indicated.

It

(*a*) *Rawlins* v. *Burgis*, 2 *V. & B.* 386.

1836.

BULLIN v. FLETCHER.

It has been urged at the bar that the rules and distinctions, acted on in these cases, have been disapproved by eminent persons. As an argument of this nature may make the Judge more cautious in concluding that a rule, which he supposes to be applicable to the case, really is so, there is no impropriety in it: but whether the authorities relating to revocation be open to great objection, as has been said, and whether it is or not a proper subject of regret that they should have been applied to cases of this nature, I do not think that I have authority to deviate from decisions which have been acquiesced in, and have for many years furnished a rule for determining the rights to property. I conceive it to be the duty of a Judge to administer the law according to the evidences of it which are to be found in the authorities, and in the recognised practice of the profession. The inquiry before him is, not what the law ought to be, but what it is; and how it is to be applied to the particular cases which are under consideration.

It may be lamented that the law upon any subject is in such a state as to induce eminent Judges and writers to express their disapprobation of it, and their regret that they are bound to give it effect; but it would be still more to be lamented, if Judges should be found who thought themselves at liberty to declare the law according to their own fancies of what it ought to be. All stability would be lost, and the law, which should be administered upon clear and fixed principles, would be involved in uncertainty and confusion.

The distinctions in these cases turn upon very small points; but, as Lord *Eldon* said in *Harmood* v. *Oglander* (*a*), "by departing from distinctions that are settled, a degree

(*a*) 8 *Ves.* 125.

1836.

BULLIN v. FLETCHER.

a degree of uncertainty is produced, so that no one can advise upon a will till the judgment of this Court is had upon it. Therefore, whether the distinction is sound or not, if it has been adopted in these cases, it is better to abide by it, than to examine whether it should have been established." That examination, however, I take the liberty of adding to Lord *Eldon*'s words, is not to be neglected, though it is the proper duty of another authority.

The law, affecting the class of cases falling within the principle upon which the foregoing case was decided, is proposed to be altered by the Bill for the Amendment of the Law of Wills, introduced by Lord *Langdale* in the present session of Parliament. By the twenty-first clause of that bill, it is provided "that no conveyance or other act made or done subsequently to the execution of a will, or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." And, generally, by the preceding provisions of the bill, a will is not to be revoked except by some instrument, or act shewing a direct intention to revoke the same.

April 12.

CARDEN *v.* MANNING.

The Plaintiff, upon motion to dismiss his bill for want of prosecution, undertook to speed, and in pursuance of the undertaking filed a replication, and served a *subpœna* to rejoin; but he did not move for a commission to examine witnesses. The Defendant afterwards moved to dismiss for want of prosecution. The motion was dismissed with costs, on the ground that after the *subpœna* to rejoin, the Plaintiff not requiring a commission, the Defendant might himself proceed with the cause.

IN *July* 1835 the Defendant moved to dismiss the bill for want of prosecution, and the Plaintiff entered into the usual undertaking to speed. In pursuance of this undertaking, he filed a replication, and served a *subpœna* to rejoin in *October* 1835; but he did not move for a commission to examine witnesses.

Mr.

1836.

CARDEN v. MANNING.

Mr. *Cooke*, for the defendant, moved to dismiss the bill with costs for want of prosecution, referring to the sixteenth and seventeenth Orders of 1831: and he mentioned *Williams* v. *Janaway* (*a*), and an anonymous case in Mr. *Simons*'s Reports. (*b*) He contended that the rule laid down in the latter case did not apply, where the Plaintiff had undertaken to speed, even under the old practice; and that, *à fortiori*, it was inapplicable since the New Orders, the object of which was to prevent the delay occasioned under the former practice by the refusal of the Plaintiff to proceed, after the cause was at issue.

Mr. *Stuart*, *contrà*, insisted that a motion to dismiss could not be made after a *subpœna* to rejoin had been served, where, as in this case, the Plaintiff did not require a commission; and that the undertaking to speed made no difference in that respect.

The MASTER *of the* ROLLS refused the motion with costs, observing that, after the *subpœna* to rejoin, the Plaintiff not requiring a commission to examine witnesses, the Defendant might himself proceed with the cause.

(*a*) 6 *Sim.* 77. (*b*) 5 *Sim.* 497.

WHITE *v.* SMITH.

Nov. 2.

Where the Defendant had neglected to take advantage of the default of the Plaintiff, until

THE replication was filed on the 4th of *November*; and the three weeks' time having expired on the 25th, no step was taken by the Plaintiff until the 8th of *January*, the Plaintiff served a *subpœna* to rejoin, and sued out a commission, and the Defendant moved to dismiss the bill for want of prosecution on affidavit that the cause was not set down for hearing, and that no rules were taken out to produce witnesses, or pass publication, the case was held to be within the seventeenth New Order of 1831, and the Plaintiff was ordered to speed the cause, but the Defendant was not allowed costs of the application.

1836.

WHITE v. SMITH.

January, when he obtained an order for a commission to examine witnesses. That order was served on the 9th of *January*. The *subpœna* to rejoin was not issued till the 13th of *January*, and it was served on the following day. Soon afterwards the commission was sued out.

Mr. *Turner* moved to dismiss the bill for want of prosecution under the seventeenth of the New Orders, upon an affidavit that the cause was not set down for hearing, and that the Plaintiff had entered no rules to produce witnesses or pass publication. It had been decided by the Vice-Chancellor in *Williams* v. *Janaway* (*a*), and in a subsequent case of *Cooke* v. *Cleary*, that the seventeenth Order applied only to cases where the Plaintiff required a commission. Here the Plaintiff had sued out a commission, and, the case being one within the seventeenth Order, no subsequent abandonment of the commission could take it out of the order; *Rayson* v. *Lees*. (*b*)

Mr. *Palmer*, for the Plaintiff, argued that, as a *subpœna* to rejoin had been served, the case was not within the seventeenth Order; and that, even if it was, the Defendant had lain by so long without acting upon it, as to deprive himself of the benefit to which he would otherwise have been entitled. *Fernes* v. *Hutchinson*. (*c*)

The following cases were cited: *Brown* v. *Moore* (*d*), *King of Spain* v. *Mendizabal* (*e*), *Williams* v. *Janaway* (*g*), *Rattenbury* v. *Fenton* (*h*), *Anon.* (*i*), *Layson* v. *Lees* (*k*), *Cooke* v. *Cleary* (*l*).

The

(*a*) 6 *Sim.* 77.
(*b*) 1 *Keen*, 14.
(*c*) 1 *Russ. & Mylne*, 22.
(*d*) 2 *Sim.* 464.
(*e*) 5 *Sim.* 596.
(*g*) 6 *Sim.* 77.
(*h*) 6 *Sim.* 368.
(*i*) 5 *Sim.* 497.
(*k*) 1 *Keen*, 14.
(*l*) Not yet reported.

The MASTER *of the* ROLLS.

1836.

WHITE v. SMITH.

By Lord *Lyndhurst*'s Order of *April* 1828, if the Plaintiff committed default in the proceedings thereby directed, the bill might be dismissed on the application of the Defendant without notice.

The case of *Fernes* v. *Hutchinson* (*a*) determined that, if the Defendant did not avail himself of the opportunity so afforded him in a reasonable time, but lay by, and permitted the Plaintiff to take subsequent steps in the suit, he lost his right to the common order.

The amended seventeenth Order of *November* 1831 provided, that, if the Plaintiff committed default in the proceedings thereby directed, the Defendant on application upon notice might obtain an order to dismiss the bill with costs, unless the Court should make special order to the contrary.

In *Williams* v. *Janaway* (*b*) the Vice-Chancellor considered that the seventeenth Order applied only to cases in which the Plaintiff required a commission, and that in other cases the old practice remained unaltered; and this decision has been since established in the case of *Cooke* v. *Cleary*, which was heard before the Vice-Chancellor, and affirmed on appeal by the Lord Chancellor.

In the anonymous case reported in 5 *Sim.* 497., the course of proceeding under the old practice is stated from the certificate of Mr. *Jackson*, a very experienced clerk in court, whose loss is regretted by the profession. It has been conceived that this course of practice is to be pursued in all cases in which there has been a *sub-pœna*

(*a*) 1 *Russ. & Mylne*, 22. (*b*) 6 *Sim.* 77.

1836.

WHITE v. SMITH.

pœna to rejoin, and the marginal note to the anonymous case might seem to warrant that opinion, but the case itself does not; it only determined what is the old practice to be pursued in cases which do not fall under the seventeenth Order.

The seventeenth Order directs, &c. (His Lordship read the Order.)

In the present case the replication was filed on the 4th of *November* 1835. Three weeks expired on the 25th; nothing was done pursuant to the order; and, as the case does not fall within the exception indicated by the cases of *Williams* v. *Janaway* and *Cooke* v. *Cleary*, I am of opinion that the Defendant was then entitled, under the seventeenth Order, to move to dismiss the bill. He lay by, however; and on the 8th of *January* 1836 the Plaintiff obtained an order for a commission to examine witnesses, which was served on the following day. The *subpœna* to rejoin was not then obtained. It was issued on the 13th and served on the 14th of *January*, and the commission was sued out soon afterwards. This motion is made upon an affidavit stating that the Plaintiff has not set down the cause for hearing, nor entered rules to produce witnesses and pass publication.

I think that this case was within the seventeenth Order, and did not cease to be so because the Defendant neglected to move to dismiss the bill when he might first have done so; but that, as to costs, the Defendant is not entitled to the same order, as he would have been entitled to, if there had been no neglect on his part.

The Plaintiff undertaking to proceed in the cause without delay, it was ordered that he do so proceed. No costs of the application were allowed.

1836.

CROUCH *v.* HICKIN.

Nov. 20. 24.

THE Plaintiff, representing himself to be the heir at law of *Thomas Spencer*, who was named in the will of *Francis Spencer* as a devisee in certain events by his will, alleged that those events had happened, and that in consequence thereof he was entitled to the estates in question.

The bill alleged that *Francis Spencer* the testator was, at the date of his will, and at the time of his death, seised of the estates in fee-simple, and the Plaintiff so stated the will that legal estates appeared to have been devised by it, and he deduced his title under one of such legal estates.

The bill alleged that the Defendants pretended title to the estates under the will of *Elizabeth Kelsall*, and set up a settlement whereby the estates were, many years before the date of the will of *Francis Spencer*, settled to the use of *Francis Spencer* for life only, with remainder in the events which happened to *Elizabeth Kelsall* in fee.

The Plaintiff then stated that, by reason of his not having possession of the title-deeds, he was unable to state what settlements were made by the ancestors of the testator; but he charged that the testator was tenant in fee, and had full power to devise, and so it would appear from the production of the settlement made on the marriage

A defence, though in words applied to only one part of the bill, if it should, on the face of it, be applicable to the whole bill, cannot stand in conjunction with another distinct defence which is applicable and applied to another distinct part of the bill.

The Defendant to part of the bill put in a plea that there were no outstanding terms, and a demurrer to the rest that the Plaintiff had no title: Held, that the plea was good, but that the demurrer, being applicable to the whole of the bill, and consequently to that part of it which was covered by the plea, was bad. But the Defendant having also demurred *ore tenus* for want of equity, and the Court being of opinion that the Plaintiff was not entitled to the discovery and relief sought by the bill, that demurrer was allowed.

1836.

CROUCH v. HICKIN.

riage of the father and mother of the testator; and the Plaintiff submitted that he was well entitled to a discovery and inspection to enable him to ascertain his right and title to the estates.

The bill proceeded to state that the Plaintiff intended to bring divers actions of ejectment for the recovery of the estates in order to establish his right, when he should have obtained the discovery he sought from the Defendants.

The bill then stated that the Defendants, *William Hickin* the younger, *George Aspley*, *Richard Aspley*, and *Martha Aspley*, threatened and intended to set up at the trial of the said actions some outstanding legal estate, term, or lease for years, and other instruments, and, in particular, a term for 400 years, which, as the Defendants alleged and pretended, was created by *Francis Spencer*, the grandfather of the said *Francis Spencer*, in some way affecting the said real estates.

The bill then suggested that, in order to enable the Plaintiff to proceed in his actions, he ought to have a disclosure from the Defendants of all things within their cognizance or means of knowledge relating to and tending to make out his title. It then stated that the witnesses to prove the death of the Plaintiff's father, through whom the Plaintiff traced his descent from *Thomas Spencer*, were abroad, and that Plaintiff was unable to proceed without a commission to examine witnesses.

The bill then suggested and negatived various grounds of title supposed to be set up on the part of the Defendants, and prayed a full discovery, or that such issues as the Court might think reasonable might be directed, and that it might be decreed that at the trial of any action

action brought by the Plaintiff for the purpose of establishing his right, the Defendant should not set up the statute of limitations; and that, if on any trial a verdict were obtained by the Plaintiff, his right to the estates might be decreed and established, and that possession thereof, as well as the title-deeds of the estate, might be delivered to him, and that an account might be taken of the rents.

The Defendants pleaded to so much of this bill as sought any relief on account of the alleged outstanding term, that there was no outstanding term; and to the rest of the bill they demurred. The cause of demurrer stated on the record was that the Plaintiff had not by his bill shewn that he was entitled to the estates in question. But the Defendants further demurred *ore tenus* for want of equity to so much of the bill as was not covered by the plea.

Sir *Charles Wetherell* and Mr. *Shadwell*, in support of the plea and demurrer.

The bill is founded in point of fact upon no equity, and the proper defence would have been a demurrer alone, had it not been for the allegation that there are outstanding terms which will impede the Plaintiff in the actions which he intends to bring for the purpose of establishing his title. A demurrer alone for want of equity, or a demurrer and answer, would have been bad, because the demurrer must have admitted the outstanding term or terms. That allegation, therefore, for which there is no foundation in fact, is met by the plea that there are no outstanding terms. That this is the correct defence, so far as the allegation of outstanding terms is concerned, appears from the case of *Armitage* v. *Wadsworth* (*a*), where, to a bill stating outstanding leases and praying

(*a*) 1 *Mad.* 189.

1836.

CROUCH v. HICKIN.

praying relief, a plea that there were no outstanding leases was allowed by Sir *Thomas Plumer*. But the Defendants demur to the rest of the bill upon the ground that the Plaintiff has no title, and, therefore, the plea is confined in terms to so much of the bill as alleges the existence of outstanding terms: *Hook* v. *Dorman*. (*a*) The Plaintiff also demurs *ore tenus* to the bill for want of equity, which he has a right to do, there being a demurrer upon the record.

Mr. *Pemberton* and Mr. *Stevenson*, *contrà*.

The demurrer upon the record, on the ground that the Plaintiff has no title, is applicable to the whole bill, and would be unavailing, if it be not a good defence to the whole bill. On the other hand, if it be a good defence to the whole bill, it cannot be used, as the Defendants use it, as a defence to a part of the bill. This demurrer, therefore, is, *quâcunque viâ datâ*, in point of pleading bad. As to the plea, it is not sufficient to put in a plea negativing the allegation that there are outstanding terms, but that plea should have been supported by an answer. There is no direct averment as to the particular term of 400 years mentioned in the bill. That term may have been surrendered, or may be supposed to have been surrendered; or it may have merged, or may be supposed to have merged in the inheritance. The truth of the averment that there is no outstanding term, may turn out to depend upon circumstances involving points of great legal nicety. Hence the necessity of supporting such a plea by an answer.

Sir *Charles Wetherell*, in reply.

It is immaterial whether the demurrer on the record, which applies only to a part of the bill, covers too much, or

(*a*) 1 *Sim. & Stu.* 227.

1836.

CROUCH v. HICKIN.

or not, because the demurrer *ore tenus* for want of equity, which applies to the whole bill, is not open to that objection. The plea that there is no outstanding term comprehends the particular case of the term of 400 years mentioned in the bill, and every other case of an outstanding term; and it was no more necessary for the Defendants to deny the existence of that particular term, than it would be for a man who denies that he has ever been at *York* to go on to aver that he was never at a particular coffee-house in that city. Had such an answer as that which is suggested been put in, it would have overruled the plea.

The MASTER *of the* ROLLS. *Nov.* 24.

A Defendant, taking care to distinguish the different parts of a bill, may plead to one part and demur to the rest; or, if necessary, put in several demurrers to distinct parts of the bill; but I conceive that according to the rules, perhaps too refined, on which the Court has acted, the distinct defences must be exclusively applicable to the distinct parts of the bill to which they are applied, and that a defence, though in words applied to only one part of the bill, if it should on the face of it be applicable to the whole bill is not good, and cannot stand in conjunction with another distinct defence which is applicable and applied to another distinct part of the bill.

The demurrer on the record is, that the Plaintiff is not entitled. This is applicable to the whole bill, to that which is covered by the plea as well as to the rest: and although it is in words applied to that part alone which is not covered by the plea, yet I think that, if

1836.

CROUCH v. HICKIN.

if the case rested upon it, the two defences could not stand together. If the Plaintiff is not entitled at all, he has no right to the assistance of the Court in respect of the outstanding term which he has alleged.

The demurrer *ore tenus* is not liable to the same objection, if the Plaintiff by his bill seeks relief in this Court, not only on account of the outstanding term, but also on other grounds.

Now, if we strike out the charge, and so much of the prayer as is founded on the alleged outstanding term, this is a bill by an heir at law of a devisee of a legal estate seeking for a discovery and delivering up of the title-deeds; for possession of the estates on account of rents; for an injunction to restrain the Defendants from setting up the statute of limitations, and for a commission to examine witnesses abroad. The Plaintiff is asking, not for discovery only, but for relief independently of the outstanding term, and independently of any assistance which he may want in his legal proceedings; and, on looking at the defences with reference to the distinct parts of the bill to which they are applicable and applied, it appears to me that the plea is good, and does not stand in need of any answer to support it. If there be no outstanding term, as upon this occasion must be admitted by the Plaintiff, there is no foundation for the relief or the discovery prayed in respect of it; and there do not appear to be any equitable circumstances suggested in the bill against the bar, and requiring an answer from the Defendants.

As to the demurrer for want of equity, the Plaintiff's title being legal, he ought to proceed at law, unless there be an impediment which cannot be removed without the assistance of the Court.

His

1836.

CROUCH *v.* HICKIN.

His title is under the will; what he has to prove is the seisin of the testator, the will, and his own descent from the devisee. He wants no assistance here to prove the will or his descent, and he does not distinctly even allege that he wants settlements and deeds prior to the date of the will to prove the seisin of the testator, but he insists generally that he is entitled to a discovery of the settlement to enable him to ascertain his own right, and to a discovery of every thing which is within the cognizance or means of knowledge of the Defendants, and upon that discovery he claims relief here. I think that he is not entitled to it, and that the plea, and also the demurrer for the cause stated *ore tenus*, must be allowed.

SAWYER *v.* BIRCHMORE.

April 19.
June 25.

THE bill was filed by persons stating themselves to be five of the next of kin, or the representatives of five of the next of kin of *James Clear*, deceased, at the time of his death, and it prayed that the Defendants, *Ann Birchmore*, *Henry Robert Briggs*, *Robert Briggs*, and *Henry Panton Reeves*, might refund the several sums which it was alleged they had been overpaid under a decree of the Court, in order that the Plaintiffs might receive what they alleged themselves to be entitled to.

Though the distribution of an intestate's estate under a decree of the Court among persons found to be the next of kin does not conclude the rights of persons who may have an equal or paramount title, yet the Court will not assist other next of kin who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims.

The testator, *James Clear*, died on the 15th of *January* 1814, having made a will by which he bequeathed the residue

1836.

SAWYER v. BIRCHMORE.

residue of his personal estate to his wife, and appointed the Defendants, *Thomas Peter Stone* and *Mary Smith*, his executors. The testator's wife having died in his lifetime, his residuary personal estate was undisposed of by his will, and became divisible among his next of kin. His will was proved by the Defendants *Thomas Peter Stone* and *Mary Smith*. In the year 1825 *Mary Smith*, alleging that the testator died without leaving any next of kin, filed a bill against her co-executor *Stone* and the *Attorney-General* to have the testator's personal estate administered under the direction of the Court.

By the decree, dated the 6th of *July* 1827, it was referred to the Master to make the usual inquiries as to the next of kin.

On the 8th of *April* 1830 the Master reported that *Ann Birchmore*, *Henry Robert Briggs*, and *Robert Briggs*, three of the Defendants to this cause, together with four other persons now represented by the Defendants, *Ann Birchmore*, *Henry Robert Briggs*, *Robert Briggs*, and *Henry Panton Reeves*, were the only next of kin of *James Clear*, the testator, at the time of his death.

The report being confirmed, a supplemental bill was filed to bring the persons so found to be the next of kin, or their representatives, before the Court; and by a decree, dated the 2d of *July* 1830, they were declared to be entitled to the residuary estate; the accounts were directed to be taken, and were accordingly taken; and at the hearing for further directions on the 16th of *April* 1831, it was referred back to the Master to tax all parties their costs; and it was ordered that, after payment thereof, the residue of the testator's estate should be apportioned and divided among the persons who were, or who represented

presented those who had been found to be, the next of kin.

On the 16th of *June* 1831 the Master reported that the ultimate residue to be divided among the next of kin of the testator living at his death, and the representatives of such of them as had since died, amounted to 5659*l.* 18*s.* 3*d.*, and, pursuant to the decree, divided that sum into seven equal parts of 808*l.* 11*s.* 2*d.* each, and the estate was distributed into those shares accordingly.

On the 2d of *May* 1833 each of the Defendants, among whom the residue of the testator's estate had been distributed, received from the solicitors of the Plaintiffs the following letter: —

"Sir,

"Our clients, Mr. *T. P. Day*, Mr. *R. Carter* and his sister, and Mr. *G. Sawyer*, have just put into our hands papers and documents to substantiate their claims as some of the next of kin of *James Clear*, late of *Leatherhead*, deceased, which papers were some time ago lodged first with Mr. *Gilman*, and afterwards with Mr. *Auberry*, to carry such claims into the Master's office in the Chancery suit brought by Miss *Smith* against the executors, but which, as it now appears, by some unaccountable misconduct was not done. This neglect, however, will not deprive our clients of their shares of the funds, seeing that their claims were perfectly well known to you and the other parties who obtained the funds out of Court. According to our impression, the amount to have been divided among the next of kin was 5737*l.* 4*s.* 2*d.*: our clients' twelfth shares, as it appears to us, would have been about 478*l.* each.

1836.

SAWYER v. BIRCHMORE.

Under the unfortunate circumstances into which our clients have fallen, their remedy now is, we apprehend, to institute a new suit to compel the parties who have obtained the fund in question to contribute to them their shares. The question of costs is the only possible impediment that can be thrown in the way of recovering their rights; but fortunately for them, you and others next of kin were perfectly well acquainted with the justice of their claims at the time you allowed the Master to make a partial report in your own favour. This is so important an ingredient in the consideration of costs, that we do not despair (if compelled to institute a suit), of being able to throw the burthen of costs upon those parties who purposely kept the Court in ignorance of our client's title. We shall be most unwilling to resort to extremes, and it will rest with yourselves to avert the consequences. We hope that after you have conferred together, you will come to a determination to administer to our clients (your own near relations) the same measure of justice without strife, which they can obtain by driving their cousins to a chancery suit;" &c.

This letter was not answered, and the Plaintiffs filed their present bill in *January* 1834 against the Defendants, amongst whom the residue of the testator's estate had been distributed, and against the executors. The bill alleged that, while the above-mentioned proceedings were depending, the defendants well knew the right of the Plaintiffs as some of the next of kin, and yet proceeded without making them parties thereto, and by concealing the state of the proceedings, and intimidating the different solicitors to whom the Plaintiffs applied to prosecute their claims, obtained a partial distribution in favour of some only of the next of kin.

The

1836.

SAWYER v. BIRCHMORE.

The Defendants, by their answer, said that they did not believe that the Plaintiffs were next of kin of the testator. They further said that the Plaintiffs did not come in and prove their alleged claims under the decree, although frequently applied to and requested so to do, and fully apprised of the consequences that would ensue from their not doing so; and they submitted that the Plaintiffs, even if they were some of the next of kin, yet having being apprised of all the proceedings had in the suit, and having been repeatedly requested, during the progress thereof, to come in and prove their alleged claims, and having neglected to take any steps to do so, ought not now to be allowed to disturb the proceedings, and the distribution consequent thereon. They admitted that they were informed of the Plaintiffs' claim before the money was distributed, but they said that they placed no reliance on the information, because of the Plaintiffs' privity and knowledge of the suit, and their neglect to bring forward their claims, though repeatedly warned of the consequences of their refusing to do so. And the Defendant *Henry Robert Briggs* stated that, on the 8th of *May* 1828, in reply to an application of the Plaintiff *R. Carter*, he, the Defendant, referred him to Mr. *Rourke* the solicitor for the Defendant *Mary Smith*, and cautioned him to be active in following up his claim.

The parties went into evidence; and among the evidence produced by the Plaintiffs were letters which had passed before the institution of the suit in 1825, between Mr. *Towse*, who had acted as the solicitor of some of the Defendants, and the solicitors of other Defendants. Mr. *Towse* had been examined as a witness by the Plaintiffs, and demurred to the interrogatory requiring the production of this correspondence, and seeking information as to other matters, on the ground

1836.

SAWYER v. BIRCHMORE.

that he was privileged by the confidential relation in which he stood to some of the Defendants, but that demurrer was overruled, with liberty to the parties Defendants to raise such objections as they should be advised. (*a*) This evidence was now objected to on the part of the Defendants, but was read *de bene esse*. The object of it was to shew that the claims of the Plaintiffs, as some of the next of kin, were recognised by the Defendants, so long ago as the year 1817, and that the Plaintiffs and Defendants at that time concurred in endeavouring to satisfy the executors of their claims, and to induce the executors to distribute the residue among them without a suit.

It was admitted at the bar, on the part of the Plaintiffs, that there was no case against the Defendant *Mary Smith*.

Mr. *Kindersley* and Mr. *Moore*, for the Plaintiffs.

In *David* v. *Frowd* (*b*) it was assumed for the purpose of the argument that the Plaintiff was the next of kin; the claim of the Plaintiffs in this case is of course equally subject to the result of an inquiry in the Master's office. The case of *David* v. *Frowd* established the principle that the decree in a suit for the administration of an intestate's estate does not declare the rights of the parties, and is consequently no final decision against the rights of those who may claim to be next of kin against persons who have been found by the Master to be the next of kin, and among whom the intestate's estate has been actually distributed. The Court will compel legatees, who have received their legacies before the creditors have been paid, to refund; *Gillespie* v. *Alexander* (*c*); and

(*a*) See *Sawyer* v. *Birchmore*, 3 *Mylne & Keen*, 572.

(*b*) 1 *Mylne & Keen*, 200.

(*c*) 3 *Russ.* 130.

1836.

SAWYER v. BIRCHMORE.

and persons who have wrongfully received an intestate's estate, or a larger share of it than they are entitled to, stand exactly in the same situation as such legatees. The Plaintiffs are content to adopt the accounts which have been taken; and ask only for the share of the intestate's estate to which they are justly entitled. The defence made by the Defendants, so far as it goes to dispute the title of the Plaintiffs, is an unrighteous one, since they recognised the claims of the Plaintiffs long before the institution of the suit by the executor, and acted for a considerable time in concurrence with the Plaintiffs. As to the other part of the defence, that the Plaintiffs had notice of the proceedings in the administration suit, and that they were urged by the Defendants to carry in their claims, that is inconsistent with the denial of the Plaintiffs' title, and there is a distinct allegation in the bill that the Plaintiffs were ignorant of the proceedings until after the distribution of the estate.

Mr. *Pemberton* and Mr. *Lynch*, *contrà*.

The circumstances of this case differ entirely from those in *David* v. *Frowd;* and the principle upon which that case was decided is sufficient to displace all title to relief on the part of the present Plaintiffs. That principle was, that no person can have his rights disposed of in an administration suit in his absence, unless he has lost his claim to relief by *laches*. In *David* v. *Frowd* the Plaintiff was an aged, bed-ridden, illiterate woman, who took such steps as she was capable of resorting to for the purpose of enforcing her rights very shortly after the distribution of the intestate's estate, the proceedings in the suit, wherein the estate was distributed, being moreover conducted with unusual celerity. Here the Plaintiffs had full notice of the proceedings, and were

1836.

SAWYER v. BIRCHMORE.

repeatedly urged to carry in their claims, if they had any; and yet, though warned of the consequences of their neglect, they voluntarily lay by, and permitted the fund to be distributed. The reasonable inference from such conduct is that the Plaintiffs had no claim for which there was any foundation; and even if they had, it is a claim which, after such gross *laches*, a court of equity will not now assist them in enforcing. Even a creditor seeking to call back a fund after it has been distributed, must satisfy the Court that he has not been excluded by his own *laches;* and if he fails to do so, the Court will not permit him to disturb the distribution. Nothing can be more unfounded or absurd than the charge upon the Plaintiffs' bill that the Defendants concealed the state of the proceedings from them, and intimidated different solicitors to whom they applied for assistance, so that they were unable to go in before the Master and establish their claims. The correspondence which is relied upon as shewing that the Defendants or some of them, in the year 1817, recognised the Plaintiffs as some of the next of kin, and equally entitled to share the residue with themselves, is inadmissible, as evidence; and if admissible, proves nothing more than that the Defendants were at one time willing to make a compromise in order to avoid delay and litigation. It is admitted that the Plaintiffs have no case against *Mary Smith*, but the other executor is still held responsible. The charge against the executors is, that they did not make the Plaintiffs parties to the supplemental bill. But *Mary Smith* is the party who filed the bill, and who had the conduct of the suit; and therefore if either of the executors is responsible on that account, it is the person against whom the charge has been abandoned.

The case of the Plaintiffs is entirely destitute of merits, both in point of pleading and of principle; in point of pleading,

1836.

SAWYER v. BIRCHMORE.

pleading, because the Plaintiffs' case is founded in gross misrepresentation, no attempt having been made to prove the false allegations in the bill that the Defendants concealed the state of the proceedings from the Plaintiffs, and that the Defendants intimidated different solicitors to whom the Plaintiffs had applied for assistance, as if in such a case solicitors were a class of persons likely to be intimidated; in point of principle, because nothing can be more contrary to justice and to law than the principle sought to be established, which is no other than this, that a person, who has had full notice of the proceedings in which a fund was distributed among parties under the decree of a court of justice, and who, if he had any interest in that fund, might have claimed his share, and was even invited to do so, may nevertheless lie by and see the fund distributed; wait till the parties have received the money, treated it as their own, and spent it, as they may well consider themselves entitled to do under the sanction of a court of justice; and then, after a lapse of months or years, call upon those parties to refund the money so awarded to them, and claim the right of throwing them into gaol, if they should be unable to make restitution. This is a principle which it is impossible that any court of justice can recognise or act upon, and which is certainly not sanctioned by the decision in *David* v. *Frowd.* That case was undoubtedly a case of the first impression, whatever opinion the judge who decided it might entertain to the contrary. The case was new, though the decision went upon the well established principle that a man's rights shall not be concluded by a distribution of property in which he is interested, made in his absence: but then that absence must be involuntary, and there must be no *laches;* and it is a total misapprehension of the principle upon which that case was determined to suppose, that the decision went to sanction

1836.

SAWYER v. BIRCHMORE.

so monstrous a claim as that of the present Plaintiffs, who call upon parties to refund the money which they have received under the sanction of the Court, after having voluntarily looked on at the distribution of the fund without attempting to enforce their alleged rights, and continue to lie by after the distribution of the fund for a period of nearly two years.

Mr. *Kindersley*, in reply.

June 25.

The MASTER *of the* ROLLS (after stating the facts of the case).

From the commencement of the suit, instituted in 1825, until the distribution of the testator's estate in *July* 1831, every thing appears to have been regularly conducted. There was no hurry or precipitation. Two years and three quarters elapsed between the decree directing the inquiry, and the report as to the next of kin. More than an additional year elapsed between the date of that report and the distribution of the estate.

At the end of nearly two years after the distribution of the estate the persons, who obtained the money, received the letter from the solicitor of the present Plaintiffs, dated the 2d of *May* 1833; and, that letter not being answered, the present bill was filed.

The parties have gone into evidence, and I consider it to be manifest, from the letter of the 2d of *May* 1833, that the Plaintiffs knew of the proceedings during their progress; and, though there is an error of date in the evidence of *George Birchmore*, it is (with the exception of that error) consistent with the other parts of the case. The correspondence shews that, long before the pro-

proceedings were instituted, the Defendants well knew that the Plaintiffs claimed to be some of the next of kin of the testator; but the allegation of concealment and intimidation is wholly destitute of proof.

The rule applicable to cases of this nature, as stated by Lord *Eldon* in *Gillespie* v. *Alexander* (*a*), is that a creditor who does not come in till the executor has paid away the residue is not without remedy, though he is barred the benefit of the decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the executor at all. In *David* v. *Frowd* (*b*), Sir *John Leach* determined that the next of kin, who had made no claim till after the fund was distributed, might maintain a suit to compel those who had been found next of kin, and had received distribution, to refund.

But all cases must be affected by their peculiar circumstances. The claim of the creditor in *Gillespie* v. *Alexander* was under investigation in the Master's office, before and at the time when the order was made to distribute the fund. In the case of *David* v. *Frowd*, the proceedings had been conducted with extraordinary rapidity. The Plaintiff did not know of the proceedings till after the distribution had taken place, and she filed her bill with very little delay. In the case of *Greig* v. *Somerville* (*c*) there had been considerable delay, but the claimant was a foreigner (the Emperor of *Russia*), and though he knew of the death of the intestate his debtor, the advertisement in the *London Gazette* appears to have been the only evidence brought to charge him with knowledge of the proceedings.

This

(*a*) 3 *Russ.* 136.
(*b*) 1 *Mylne & Keen*, 200.
(*c*) 1 *Russ. & Mylne*, 338.

1836.

SAWYER v. BIRCHMORE.

This case therefore differs materially from the others. The Plaintiffs knew of the proceedings, instructed solicitors to act for them in prosecuting their claim, but take no proceedings under the decree, and no proceedings against those who have had the benefit of the decree, till more than two years after the distribution.

I think that under such circumstances, if there was nothing else to affect the case, the Court ought not to assist parties who so act; but here the Defendants knew of the Plaintiffs' claims, and it is alleged that those claims were not only known by the Defendants, but admitted by them to be just; and if the fact were so, I think that the Plaintiffs, notwithstanding their own negligence, might be entitled to relief. One set of persons, knowing that the right of which they claimed the benefit was common to themselves and to other persons, could not, on the false pretence of their being the only persons entitled, be permitted to avail themselves of the authority of the Court to obtain the whole fund for themselves to the exclusion of the others whom they knew to be equally entitled.

But on a careful examination of the correspondence, and of the proceedings in the cause, so far as they have been brought under my notice, I am satisfied that at the time when the first bill was filed, and before the decree, none of the twelve persons claiming to be next of kin had made out a title. For the purpose of avoiding trouble and expence, and to induce the executors to divide the fund, any of the claimants were probably willing to admit the claims of the others; but there is nothing to shew that satisfactory proofs were ever adduced, or that any party agreed to admit the validity of the claims of the others notwithstanding the want of satisfactory proofs.

Whether

1836.

SAWYER v. BIRCHMORE.

Whether the Plaintiffs have now proved that they are next of kin, has not been discussed before me; nor is it necessary; for, under the circumstances to which I have adverted, considering the knowledge which the Plaintiffs had of the former proceedings; their neglect to go in and prosecute their claims; the lapse of time after distribution before the present suit was instituted; the failure of the Plaintiffs to establish any case of concealment, or intimidation; or any conclusive recognition by the Defendants of the validity of their claims, I am of opinion that the Plaintiffs cannot sustain the suit, and I am therefore compelled to dismiss the bill; and as the Defendants have nothing to do with the default, if any, which has deprived the Plaintiffs of the opportunity of making out such claims, if any, as they may have been justly entitled to, I must dismiss it with costs.

Bill dismissed with costs.

1836.

April 28.

JENNINGS *v.* SIMPSON.

A declaration, being the act of the Court, cannot be introduced into a decree taken by the Plaintiff in the absence of the Defendant, which decree must be such as the Plaintiff can abide by at his own peril.

In a creditor's suit the Defendant did not appear at the hearing, and the counsel for the Plaintiff introduced into the minutes of the decree a declaration that the Defendant had notice of the Plaintiff's bond, which was admitted by the answer. The declaration was irregular, the Plaintiff being entitled only to the common decree in a creditor's suit.

THIS was a creditor's suit on behalf of the Plaintiff, a bond creditor, and all other the creditors of *Stephen Simpson* deceased, against the Defendant, *Simpson*'s executor.

The Defendant by his answer admitted the bond, and that, shortly after the testator's decease, he received a letter from the Plaintiff stating that the Plaintiff was in possession of the bond, and that subsequently to the receipt of such letter, he had paid many simple contract creditors, whose names were mentioned in the schedule annexed to his answer.

On the cause coming on to be heard the Defendant did not appear, and Mr. *Webster*, for the Plaintiff, took such decree as he could abide by.

In the minutes of the decree prepared by the counsel for the Plaintiff, a declaration was inserted, in conformity with the admission in the Defendant's answer, that the Defendant had notice of the Plaintiff's bond. The Registrar declined to draw up the decree with that declaration, and gave out a minute of the common decree in a creditor's suit.

Mr. *Webster* now applied to the Court for leave to insert this declaration in the decree, submitting that, if it were not introduced, the Plaintiff would be in a worse situation than he would have been if the Defendant had appeared, and that the Plaintiff was entitled to it upon the face of the answer.

The

The MASTER *of the* ROLLS.

1836.

JENNINGS *v.* SIMPSON.

A declaration is the act of the Court, and I think that the Registrar is right in considering that it cannot be introduced into a decree taken by the Plaintiff at his own peril, in the absence of the Defendant. The Plaintiff must, according to the usual practice, take such decree as he can abide by, without the interposition of the Court.

BENNETT *v.* REES.

Aug. 4.

THE bill was filed by the vendors for the specific performance of a contract for the purchase of an estate by the Defendant. The answer of the Defendant admitted the contract, and that the Plaintiffs had delivered to him an abstract of their title; but the Defendant said he was advised that the same was an imperfect abstract, inasmuch as there was nothing to shew that the title disclosed thereby was the title to the said purchased premises. And the answer further stated that the Plaintiff had never, before the filing of the bill, produced any or sufficient evidence of the identity of the premises which were the subject of the contract with the premises mentioned in the abstract. And the Defendant believed that the Plaintiff had not at any time up to that period been able to make a good title to the premises.

In suits for specific performance between vendor and purchaser, every thing connected with the title may be the subject of the usual reference upon motion as to the vendor's title, and may be added by way of inquiry to that reference; but the Court will not allow any inquiry to be added as to matters which have no reference to the title, and which are not admitted by the answer.

A motion was now made, on the part of the Defendant, that it might be referred to the Master to inquire whether a good title could be made to the premises in question, and whether the Plaintiffs ever and when delivered

1836.

BENNETT v. REES.

livered to the Defendant an abstract of their title, and whether the same was a perfect abstract, or in any and what way deficient; and if deficient, whether the Defendant ever and when made any objection on account of such deficiency, and whether such abstract was afterwards perfected, and when, with liberty to state special circumstances.

In support of the motion it was said that, it being extremely probable in this case that the only question between the parties would be ultimately one of costs, the object of the present application was to save the expense of an additional reference to the Master. Before Lord *Rosslyn*'s time there was no instance, in a suit between vendor and purchaser, of a reference being granted upon motion to inquire as to the title of the vendor. In *Moss* v. *Matthews* (*a*) Lord *Rosslyn*, upon the Defendant's motion after answer, directed a reference as to the title, to which he added an inquiry when the abstract was delivered. In *Wright* v. *Bond* (*b*), after answer submitting to perform the contract, Lord *Eldon*, upon the motion of the Plaintiff, directed a reference as to title, and whether a good title appeared upon the abstract; and he observed that there was then a variety of precedents for such an order, though he should have doubted of it fifteen years ago. In *Balmanno* v. *Lumley* (*c*) the reference as to title was ordered even before answer; and in *Gibson* v. *Clarke* (*d*), Lord *Eldon* seems to have thought that the Court had gone too far in receding from the old practice, and that the inquiry at what time a title could be made could only be properly made upon further directions. The case of *Jennings* v. *Hopton* (*e*), however, settled the practice of the Court upon this

(*a*) 3 *Ves.* 279.
(*b*) 11 *Ves.* 39.
(*c*) 1 *V. & B.* 224.
(*d*) 2 *V. & B.* 103.
(*e*) 1 *Mad.* 211.

this point; in that case, Sir *T. Plumer*, after consulting the Lord Chancellor, ruled that where there was a reference upon the title, the reference must be complete, and extend to all that regards the title. In *Hyde* v. *Wroughton* (*a*) Sir *John Leach* refused to grant, on a separate motion, an order to inquire at what time a title was made, where the party had omitted in the first instance to add that inquiry to the order for a reference of title. The mere finding by the Master that a good title was not made until after the filing of the bill, was not conclusive as to fixing the vendor with costs. *Long* v. *Collier*. (*b*) It was expedient therefore that such inquiries should be added to the common order as would enable the Court at the hearing to form a judgment at once upon the question of costs. In *Holwood* v. *Bailey* (*c*) the Master found that a recovery had not been suffered until after the filing of the bill; and it being insisted on the part of the vendor that his solicitor had offered to suffer the recovery before the filing of the bill, which offer was not accepted, the Court directed a second reference to ascertain upon what grounds the Master had found that a good title was not shewn before the filing of the bill. The expense of this second reference might have been avoided by adding a sufficiently comprehensive inquiry to the common order. The only question was whether the inquiries asked for related to the title; if they did, they were within the rule laid down by Sir *Thomas Plumer* in *Jennings* v. *Hopton*.

On the other side, it was contended that such an order as was now asked for, on the part of the vendor, was altogether without precedent, and could not, consistently with the established practice, be granted by the

(*a*) 3 *Mad.* 279.
(*b*) 4 *Russ.* 267.
(*c*) 4 *Russ.* 271.

1836.

BENNETT v. REES.

the Court. In *Jennings* v. *Hopton*, where the rule was laid down that a reference upon the title must extend to all that regarded the title, Sir *Thomas Plumer* added, "but not to other matters." Now there was nothing in the pleadings to warrant such an addition to the common order as that now asked for; and the Court would not direct an inquiry upon motion which, extending as it did to matters foreign to the pleadings, could not be directed even upon decree. In *Long* v. *Collier* there were special circumstances. No specialty was shewn in the present case; and generally, when the Master reported against the title, the purchaser was entitled to move for the dismissal of the bill; *Walters* v. *Pyman*. (*a*)

Mr. *Kindersley* and Mr. *Cooper*, in support of the motion.

Mr. *Lloyd*, *contrà*.

The MASTER *of the* ROLLS.

In suits for specific performance between vendor and purchaser, the Court has, for some time past, been in the habit, upon admission of the Defendant by his answer that there is nothing but the title in dispute, of directing a reference, upon motion, to inquire into the title; and even before answer the title will be referred, when no objection is raised by the Defendant. Every thing that appears to be connected with the title may be the subject of that reference. I think, therefore, that there is no objection, in addition to the ordinary reference, to an inquiry whether the Defendant objected at any time to the want of evidence as to the identity of the premises. As to the inquiry whether the abstract

(*a*) 19 *Ves.* 351.

stract was perfect, and if deficient, in what respects its deficiency consisted, and whether it was ever perfected, the ordinary rule of the Court does not justify the introduction of that part of the proposed reference. It was directed by Sir *John Leach*, that in every order by which it was referred to the Master to inquire whether a good title could be made, there should be inserted a direction that, if the Master should find that a good title could be made, he should inquire when it was first shewn; and so the order is now always made, unless for some reason stated at the time, and by the express direction of the Court, the inquiry as to the time when a good title was first shewn should be omitted.

The order was as follows: —

"His Lordship doth order that it be referred to the Master of this Court to inquire and state to the Court whether the Plaintiff can make a good title to the estate in question, in this cause agreed to be purchased by the Defendant, and when such title was first shewn, and whether the Defendant or his solicitor ever and when required of the Plaintiffs or their solicitor any and what evidence of the identity of the premises in the abstract with the premises purchased; and for the better making the said inquiry, the parties are to produce before the Master upon oath all deeds, books, papers and writings in their custody relating thereto, and to be examined upon interrogatories as the Master shall direct."

1836.

May 5.
Aug. 4.

DOUGLAS *v.* CONGREVE.

A testator gave to *M. S.* 50,000*l.* 3 per cent. consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate:

Held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the will from the payment of legacy duty.

BY a settlement dated the 1st of *October* 1828, made in contemplation of a marriage, which was shortly afterwards solemnised, between the Plaintiff *Margaret Stoddart Douglas*, then *Margaret Brazier*, and the Defendant *James Douglas Stoddart Douglas*, the sum of 11,510*l.* 15*s.* 10*d.* three per cent. consolidated bank annuities was transferred into the names of trustees upon trust to pay the interest and dividends thereof to the Plaintiff, or such person or persons as she should from time to time by any writing direct and appoint, but not so as to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation, for and during her natural life, for her sole, separate, and independent use and benefit, so as not to be in any manner subject to the debts, engagements, or control of her then intended, or any future husband; and after the decease of the Plaintiff in the lifetime of the said *J. D. S. Douglas*, upon trust to pay the interest and dividends to *J. D. S. Douglas* for his life, and after the decease of the survivor of them the said *J. D. S. Douglas* and the Plaintiff, it was provided that the said trust monies, &c. and the interest, and dividends should remain, in case there should

The testator devised and bequeathed the residue of his estate and effects real and personal to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to *M. S.* for her life, and after her decease to pay and transfer such residue in equal moieties to the persons therein mentioned:

Held, that the tenant for life was entitled to the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as should elapse before the conversion of the residue according to the direction of the will.

1836.

DOUGLAS v. CONGREVE.

should be any child or children of the Plaintiff either by the said *J. D. S. Douglas* or any future husband, in trust for such children or child in manner therein mentioned. And in case there should be no child or children of the Plaintiff, in whom the said trust monies should become absolutely vested under the trusts therein declared, then the said trust monies, &c., should, if the Plaintiff should survive the said *J. D. S. Douglas*, be in trust for the Plaintiff, her executors, administrators, and assigns, for her absolute benefit; but if the Plaintiff should die in the lifetime of the said *J. D. S. Douglas*, then upon such trusts, and for such intents and purposes as the Plaintiff by any deed in writing or by her last will and testament should, in manner therein mentioned, direct or appoint; and in default of such direction or appointment, in trust for *J. D. S. Douglas*, his executors, administrators, and assigns, for his and their own absolute use. And *J. D. S. Douglas* thereby covenanted with the trustees of the settlement, that, if at any time or times during the then intended coverture any real or personal estate should descend, or devolve to, or vest in the Plaintiff, or in the said *J. D. S. Douglas* in her right, which real or personal estate should by any one devise, bequest, or other act exceed the sum of 200*l.*, then, and so often as the same should happen, he the said *J. D. S. Douglas* would execute, or cause to be executed, or join, or concur with the Plaintiff, her heirs, executors, or administrators, in executing all such acts as should be necessary and proper for conveying, assuring, and confirming the said real and personal estate in such manner as that, regard being had to the nature and quality of the premises respectively, the said real and personal estate might be vested in the trustees or trustee for the time being of the said indenture, upon such trusts, and for such intents and purposes as would

1836.
DOUGLAS
v.
CONGREVE.

best, or nearest correspond with the trusts, intents, and purposes therein expressed and contained concerning the same trust monies, and in the mean time to permit the same to be held, enjoyed, and disposed of accordingly.

George Douglas, the testator in the cause, by his will, dated the 12th of *March* 1831, after directing all his just debts to be fully paid, gave and bequeathed to Mrs. *Margaret Stoddart*, wife of *James Douglas Stoddart*, then residing with him, 50,000*l.*, three per cent consolidated annuities, to be transferred within six months after his decease to her, or as she should direct for her own sole and separate use, independent of her husband; and he gave, devised, and bequeathed all his manors, messuages, farms, lands, and hereditaments at *Chilston* and elsewhere in the county of *Kent*, with their appurtenances, together with the use of all his household goods, plate, linen, horses, and other cattle, and all his farming, and gardening, live and dead stock, implements and utensils used in, and about his said estates, unto the said *Margaret Stoddart* for and during the term of her natural life, for her independent use and benefit; and from and after her decease, he gave, devised, and bequeathed all, and every his said manors, lands, and hereditaments, with the goods and chattels therein, and thereon as aforesaid, unto and to the use of the said *James Douglas Stoddart* for his natural life, with remainder to the use of the heirs of the body of *Margaret Stoddart* in tail, with remainder to the use of his nephew, the Revd. *Alexander Houstoun*, for his natural life, with remainder to the use of the heirs of his body in tail, with remainder to the use of his niece *Elizabeth Houstoun*, for her life, with remainder to the use of the heirs of her body in tail, with remainder to the use of

1836.

DOUGLAS v. CONGREVE.

of her cousin, *Aretas Akers*, for his natural life, with remainder to the use of the heirs of his body in tail. And he thereby declared that all the aforesaid limitations of his estate were intended by him to be in strict settlement, with remainder to his own right heirs for ever; and he gave, devised, and bequeathed all his plantations, and real estate whatsoever in the island of *Grenada*, with all the negroes and slaves, cattle and personal estate whatsoever thereon unto the said *James Douglas Stoddart*, his heirs, executors, administrators, and assigns, for ever; and he devised and bequeathed all his plantations and real estate in the island of *Tobago*, with the negroes, slaves, cattle, and personal estate thereon, unto *George Stoddart* (brother of the said *James Douglas Stoddart*) his heirs, executors, administrators, and assigns for ever. And he gave and bequeathed his leasehold house in *Cumberland Street*, *Portman Square*, with the fixtures, furniture, and household goods and effects therein, unto the said *Elizabeth Houstoun* for her own absolute use and benefit, and also the sum of 100*l.* to purchase a gold repeating watch; and he gave and bequeathed unto his nephew, the Revd. *Alexander Houstoun*, the sum of 5000*l.*; and, after giving a considerable number of pecuniary legacies to the persons therein named, he directed that the duty upon all the pecuniary legacies, thereinbefore bequeathed, should be paid out of his general personal estate; and as to all the rest, residue, and remainder of his estate and effects whatsoever, and wheresoever, real and personal, he gave, devised, and bequeathed the same unto *William Congreve*, *Ralph Dunn* and *John Morrison*, their heirs, executors, and administrators, according to the natures and qualities thereof, upon trust to convert the same into government securities in their own names, and to pay to the said *Margaret Stoddart*, or to empower

1836.

DOUGLAS v. CONGREVE.

her to receive and take the interest and dividends thereof for her natural life, for her sole, separate, and independent use and benefit; and from and after her decease, to pay, assign, and transfer one moiety of all such residue unto the Revd. *Alexander Houstoun* for his own absolute use and benefit, and the other, or remaining moiety, unto his relation, *Aretas Akers*, for his own absolute use and benefit. And he appointed the said *William Congreve*, *Ralph Dunn*, and *John Morrison*, executors of his will.

The testator died on the 12th of *March*, 1833, and his will was proved by *William Congreve* and *Ralph Dunn*, two of the executors named therein.

James Douglas Stoddart, after the testator's death, assumed, by the King's license, the name of *Douglas*.

The bill was filed by *Margaret Stoddart Douglas*, by her next friend, against the executors, against her husband, *James Douglas Stoddart Douglas*, and against other parties interested under the will, to have the will established, and the trusts thereof carried into execution.

The decree, made at the hearing, directed the usual accounts and inquiries; and on the cause coming on for further directions on the Master's report, the following questions were raised on the construction of the will:

First, whether the legacy of 50,000*l.* three per cent. consols, given to the Plaintiff for her sole and separate use, was subject to the covenant of her husband, contained in the marriage settlement.

Secondly, whether a portion of the plate, deposited with the testator's bankers at the time of his death, passed

passed under the will to the Plaintiff, or was to be considered as part of the testator's residuary personal estate.

Thirdly, what interest the Plaintiff took in the various chattels bequeathed to her for her use during her life, with remainder over.

Fourthly, what estate the Plaintiff took under the devise of the real estate at *Chilston* and elsewhere in the county of *Kent*.

Fifthly, whether the bequest of the 50,000*l.* three per cent. consols was to be considered as a pecuniary legacy, and, as such, exempted by the testator from the payment of legacy duty.

Sixthly, from what time interest was payable on the bequest of the testator's residuary personal estate.

The question whether the Plaintiff took an estate tail, or an estate for life, under the devise of the *Kentish* estates, was, upon a suggestion that the parties were desirous of having the opinion of a court of law, directed to be made the subject of a case.

Mr. *Pemberton* and Mr. *Griffith Richards*, for the Plaintiff.

The first question, arising upon this will, is, whether the Plaintiff is entitled to have the legacy of 50,000*l.* three per cent. consols transferred to her according to the express direction of the testator, or whether that legacy is subject to the covenant in the settlement, under which the husband covenants to concur in settling upon the trusts of the settlement any sum exceeding 200*l.*

1836.

DOUGLAS v. CONGREVE.

which might thereafter vest in the Plaintiff, or in himself in her right. That provision in the settlement is clearly intended to be applicable only to such after-acquired property as might be subject to the control of the husband, and not to property given, as this legacy is given, to her sole and separate use. The covenant could not preclude the author of the settlement from making a bequest to the Plaintiff for her absolute benefit. There are no children of the marriage, and Mr. *Douglas* concurs with the Plaintiff in desiring that the legacy should be transferred to her, in conformity with the direction in the will.

The next question is, whether the Master is right in finding that a certain portion of plate belonging to the testator, which was deposited at his bankers' upon his going abroad, and continued to be so deposited at the time of his death, did not pass under the bequest to the Plaintiff of the use of all the testator's goods, plate, &c., used in and about his estates, for her life, with remainder over; or whether this portion of the plate is undisposed of. The words of the will do not confine the gift to the plate actually in the house; the service of plate was incomplete without that part of it which was deposited with the bankers; and it is clear that the testator could never have intended that a part only of his plate should be used and enjoyed by the Plaintiff, and that the other part should fall into the residue.

With respect to the bequest for life to the Plaintiff of the testator's household goods, plate, linen, horses, and other cattle, live and dead stock, &c., there is a distinction as to those things, "*quæ ipso usu consumuntur*," and which, being incapable of a limitation over, must be considered as the absolute property of the Plaintiff.

In

In *Randall* v. *Russell* (*a*) Sir *William Grant*, after observing that originally there could be no limitation over of a chattel, says that "a gift for life of a chattel is now construed to be a gift of the usufruct only. But, when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over, after a life interest, must be held to be ineffectual."

As to the question whether the bequest of 50,000*l.* three per cent. bank annuities, to be transferred within six months after the testator's decease, is to be considered as a pecuniary legacy, it is, in effect, a bequest of so much money as would purchase that amount of stock. A gift of an annuity gives the legatee a right to call for the value of the annuity in monies numbered: *Dawson* v. *Hearn* (*b*): now stock is money in the hands of the government, and the holder of stock is entitled to a perpetual annuity, redeemable on payment of the money. A gift of stock is a gift of a particular species of annuity, and entitles the legatee to the value of the stock, as much as a gift of any other annuity entitles the legatee to call for the value of the annuity. It is a pecuniary legacy, therefore; and, being a pecuniary legacy, it is exempted by the testator from the payment of legacy duty.

The last question, whether the tenant for life of the residue, which is directed to be converted into government securities, is entitled to the income during the first year after the testator's death, is a very important one to the Plaintiff, involving, as it does, the interest upon a sum of more than 100,000*l.*

The

(*a*) 3 *Mer.* 195. (*b*) 1 *Russ. & Mylne*, 606.

1836.

DOUGLAS v. CONGREVE.

The disposition of the residue is, in the present case, made in the most ordinary terms: the testator directs his trustees to convert the residue of his real and personal estate into government securities, and to pay the interest and dividends to *Margaret Stoddart* for her life, and, after her decease, to transfer the principal in equal moieties to the two persons named in the will. Simple, however, as the language of the will is, no uniform rule has been established for the payment of the interest to the tenant for life, and at what period such payment shall commence, is a question which is left in great uncertainty by the authorities upon this subject.

In *La Terriere* v. *Bulmer* (*a*) it was held that the tenant for life of a residue, which was directed to be laid out in certain securities, was entitled to the income accrued in the first year after the testator's decease on such parts of the testator's estate as were invested at his death in the specified securities, and on such parts as were afterwards invested in those securities within the same year, but that the income before such investment formed part of the capital of the residue. In *Angerstein* v. *Martin* (*b*) the testator devised lands to *A.* for life, remainder to the children of *A.* in strict settlement; and he directed the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands to be settled to the same uses, with a proviso that the trust-monies, until they should be laid out, might be invested on government or real securities, the dividends and interest of which were to go and be paid as the rest of the lands to be purchased would go and be payable. A large portion of the testator's personal estate, not required

(*a*) 2 *Sim.* 18. (*b*) 1 *Turn. & Russ.* 232.

required for the payment of debts and legacies, being invested in the funds and upon securities carrying interest, Lord *Eldon* held that the tenant for life was entitled to the interest of that portion from the death of the testator. *Hewitt* v. *Morris* (*a*) is an authority to the same effect. In *Dimes* v. *Scott* (*b*) the testator bequeathed to trustees his money, securities for money, and all other his personal estate upon trust to convert the same into money, and after payment of his debts to stand possessed of the residue, in trust to invest the same in government or real securities, and to pay the interest and dividends to his wife for her life, and after her decease, upon the trusts therein mentioned. The testator had a share in an *Indian* loan, bearing interest at ten per cent., which the trustees suffered to remain unconverted for several years, paying the interest of ten per cent. to the tenant for life. When the produce of this security was, at length, invested in three per cent. stock, the funds were so low that it produced considerably more stock than it would have done had the investment been made at the end of a year from the testator's death; yet the trustees were held liable to the testator's estate for the difference between the interest at ten per cent., which they had paid to the tenant for life, and the interest which the tenant for life would have received had the share been converted, and the produce invested in three per cent. stock, at the end of a year from the testator's death. The tenant for life was held to be entitled during the first year after the testator's decease to the interest on so much three per cent. stock as would have been produced by the sale of the *Indian* share, had it been converted at the end of a year after the testator's decease. This case was determined by Lord *Gifford*, whose decision was affirmed, upon

(*a*) 1 *Turn. & Russ.* 241. (*b*) 4 *Russ.* 195.

1836.

DOUGLAS v. CONGREVE.

upon appeal, by Lord *Lyndhurst*. It is inconsistent with *Angerstein* v. *Martin*, and the rule which it introduces is less convenient and reasonable than the rule laid down by Lord *Eldon*.

Mr. *Phillimore*, for the Defendant Mr. *Douglas*, cited *Kelly* v. *Powlet* (*a*) where, upon the construction of the Duchess of *Bolton*'s will, plate, though not mentioned in the will, and whether in common use or not, was held to pass under a bequest of household furniture and farming utensils, which should be in and upon the premises at the death of the testatrix.

Mr. *Tinney* and Mr. *Maclean*, for the trustees of the settlement.

Mr. *Kindersley* and Mr. *R. D. Thomson*, for the Defendants, the persons entitled in remainder to the residuary estate.

If the testator had intended the whole of his household furniture to pass under the bequest to the Plaintiff, the case of *Kelly* v. *Powlet* might be in point; but it is clear that he did not intend the whole to pass, because he afterwards disposes of his house in *Cumberland Street* with the furniture, household goods, and effects therein. The plate, therefore, used in and about the house at *Chilton* is all that is disposed of; and there is no evidence to shew that the plate deposited at the bankers ever had been at *Chilton*.

As to the question whether the legacy of the 50,000*l.* three per cent. stock can be considered as a pecuniary legacy, it has been decided that stock will not pass under

(*a*) *Ambl.* 605.

under the word money, or words equivalent to money: *Ommanney* v. *Butcher* (*a*), *Gosden* v. *Dotterill.* (*b*)

Among the live stock, of which the use is given to the Plaintiff for her life, there are deer; those animals savour of the realty, and the Plaintiff is bound to keep them up together with the park. All the perishable articles should be valued, and the value accounted for by the tenant for life, who is entitled to the usufruct, not to the property itself. Some of the chattels will be deteriorated by enjoyment; others may be entirely worn out and destroyed, but subject to such deterioration, be it greater or less, according to the nature of the property, the tenant for life is accountable for the whole to the remaindermen.

From what time the tenant for life is entitled to interest upon the residue, directed in this case to be invested in government securities, is a question of considerable difficulty, and the authorities on this subject hardly admit of being reconciled. According to the rule laid down by Sir *Anthony Hart* in *La Terriere* v. *Bulmer* (*c*), the tenant for life is not entitled, during the first year, or until investment if made within the year, to interest in respect of any part of the testator's estate, that was not already invested in the securities wherein the investment of the residue is directed to be made at the testator's death. That rule appears to be a reasonable one, and is in conformity with the rule laid down by Lord *Eldon* in *Sitwell* v. *Bernard.* (*d*) In *Stott* v. *Hollingworth* (*e*), Sir *John Leach* was of opinion that the tenant for life of the

(*a*) 1 *Turn. & Russ.* 260.
(*b*) 1 *Mylne & Keen*, 56.
(*c*) 2 *Sim.* 18.
(*d*) 6 *Ves.* 520.
(*e*) 3 *Mad.* 161.

1836.

DOUGLAS v. CONGREVE.

the residue could not claim interest until a year after the testator's death, upon the ground that a pecuniary legatee could not claim his legacy until that time, and that the residue was a fund which could not be ascertained till after the payment of debts and legacies, and which might never have any existence. In *Taylor* v. *Hibbert* (*a*), where the testator, after devising lands to uses in strict settlement, bequeathed the residue of his personalty to be invested in lands to be settled to the same uses, Sir *Thomas Plumer* held that the tenant for life was not entitled to the interest of the residue until one year from the testator's death. Sir *Thomas Plumer* considered the general principle to be established by the judgment of Lord *Eldon* in *Sitwell* v. *Bernard*, and he thought it would be so inconvenient to depart from a rule once established, that, unless the intention of the testator could be shewn to be quite incompatible with it, the rule should not be made to give way. To these authorities are opposed the cases of *Angerstein* v. *Martin* (*b*) and *Hewitt* v. *Morris* (*c*), which were not reported at the time when *Stott* v. *Hollingworth*, and *Taylor* v. *Hibbert* were decided, and in which it certainly appears from Lord *Eldon*'s own statement of the principle upon which his judgment proceeded in *Sitwell* v. *Bernard*, that his meaning was not accurately understood in some of the subsequent cases.

Mr. *Pemberton*, in reply.

Aug. 4. *The* MASTER *of the* ROLLS.

This cause having come on to be heard for further directions, several questions were made at the bar: first,

(*a*) 1 *J. & W.* 308.
(*b*) 1 *Turn. & Russ.* 232.
(*c*) *ibid.* 241.

1836.

DOUGLAS v. CONGREVE.

first, whether the legacy of 50,000*l.* three per cent. consols, given to the Plaintiff for her sole and separate use, independent of her husband, is subject to the covenant of her husband contained in the marriage settlement, and I think that it is not. The covenant, as it appears to me, could only relate to property which, in right of the wife, became subject to the control of the husband, and not to property which, by the will of the giver, was to belong to her independently of him.

Secondly, whether certain plate, deposited with the testator's bankers at the time of his death, is to be considered as part of his general personal estate, or as comprised in the devise and bequest for the use of the Plaintiffs with remainder over. The Master has found that this plate was part of the general estate not specifically bequeathed, and upon consideration I concur in his opinion. If the testator's attention had been directed to the subject, he might probably have provided otherwise; but I must endeavour to give effect to the words as they stand. In the first clause, household goods and plate are mentioned in juxta-position; he did not mean all his household goods, because he has subsequently given his household goods in *Cumberland Street.* The first gift had therefore a limitation, and the limitation was to such household goods as were used in or about his said estates; and it appears to me that the same limitation, being applied to the plate, will exclude that which was deposited at the bankers'.

The next question is what estate or interest Mrs. *Douglas* takes in the property devised to her; but this is a legal question, and as the parties have expressed their desire to have the opinion of a court of law, it is not at present necessary to take it into consideration.

The

1836.

DOUGLAS v. CONGREVE.

The next question relates to the legacy duty on the legacy of 50,000*l.* three per cent. consols. The testator having given this legacy of stock, and afterwards several legacies of sums of money, directs that the duty upon his pecuniary legacies shall be paid out of his general personal estate; and the question is whether the legacy duty upon the consolidated bank annuities given to the Plaintiff is to be paid under the direction, and I think that it is not. In the cases of *Hotham* v. *Sutton* (*a*), and *Ommanney* v. *Butcher* (*b*), it was held that stock could not be considered as passing or described by the word money, and, having regard to those authorities, I think that I cannot consider a legacy of a sum of stock as a pecuniary legacy.

The next, and, I believe, the last question, relates to the interest accrued on the testator's residuary estate during the first year after the testator's death. Is the Plaintiff, as tenant for life, entitled to that interest, or ought it to be added to the principal and invested as part thereof? Upon this subject the authorities are conflicting, and no certain rule appears to be established. In the case of *Sitwell* v. *Bernard* (*c*) the direction was to lay out the residue of the personal estate with all convenient speed in the purchase of real estate to be settled; and the interest of such residue of the testator's personal estate was to accumulate and be laid out in lands, to be settled in like manner as the testator had directed with respect to the residuum of his personal estate. The collection and investment of the personal estate were for some time delayed, and Lord *Eldon* held the tenant for life entitled to the interest from the end of a year after the death of the testator. An accumulation was directed, — for how long

(*a*) 15 *Ves.* 303.
(*b*) 1 *Turn. & Russ.* 260.
(*c*) 6 *Ves.* 520.

1836.

DOUGLAS v. CONGREVE.

long was not said — and Lord *Eldon* limited the time to one year. In *Gibson* v. *Bott* (*a*) the residuary estate, comprising a lease and farming stock, was to be converted into money as soon as conveniently might be. Within half a year after the testator's death, the farming stock being then increased in value, was sold; the lease, for want of title, could not be sold. It was held that the tenant for life of the residue should have interest from the conversion of the stock, and have the rent of the leasehold from the testator's death.

In *Fearns* v. *Young* (*b*) Lord *Eldon* stated it to be not well settled whether the tenant for life is entitled to interest from the death, or from a year afterwards.

In *Stott* v. *Hollingworth* (*c*) Sir *John Leach* seems to have thought it clear that the tenant for life of a residue had no claim to interest until the end of a year after the testator's death.

In *Taylor* v. *Hibbert* (*d*) Sir *Thomas Plumer* appears to have considered it a general rule, that the end of the first year was to be the period at which the enjoyment of a tenant for life of the residue was to commence; but he thought that Lord *Eldon's* judgment in *Sitwell* v. *Bernard* was not founded on the direction to accumulate; and, as Lord *Eldon* himself in a subsequent case said otherwise, the authority of *Taylor* v. *Hibbert* is impaired. In *Angerstein* v. *Martin* (*e*) the direction was that the residue of the personal estate, subject to debts and legacies, should with all convenient speed be laid out in the purchase of lands to be settled, with a proviso that the trust monies, until laid out in land, might be invested

(*a*) 7 *Ves.* 89.
(*b*) 9 *Ves.* 549.
(*c*) 5 *Mad.* 161.
(*d*) 1 *J. & W.* 308.
(*e*) 1 *Turn. & Russ.* 232.

1836.

DOUGLAS v. CONGREVE.

invested on government or real securities, the dividends of which were to go as the rents of the lands would go. The cases of *Stott* v. *Hollingworth* and *Taylor* v. *Hibbert* were cited, but Lord *Eldon* held that the interest of a portion of the personal estate, which was not required for debts and legacies, and was invested in the funds, and on securities carrying interest, belonged to the tenant for life. It would appear that the *Russian* funds were part of the securities on which the personal estate was invested at the testator's death.

In *Hewitt* v. *Morris* (*a*) the tenant for life was held, by Lord *Eldon*, to be entitled to the interest which accrued from the testator's death. In that case the securities seem to have been the same as those on which the testator had directed his residuary estate to be invested.

In *Dimes* v. *Scott* (*b*) the testator directed the residue of his personal estate to be converted into money and invested in government or real securities. Part of the estate consisted of money lent to the *East India Company*. After it had been determined that a conversion ought to have been made at the end of a year, a question arose whether the tenant for life was entitled to the interest actually made during the year, and it was decided that he was entitled only to dividends on so much three per cent stock as would have been produced by the conversion of the property at the end of the year.

In *La Terrière* v. *Bulmer* (*c*) Sir *Anthony Hart* decided that the tenant for life of residue, which is directed to be laid out in certain securities, is entitled to the income accrued

(*a*) 1 *Turn. & Russ.* 241.
(*b*) 4 *Russ.* 195.
(*c*) 2 *Sim.* 18.

1836.

DOUGLAS v. CONGREVE.

accrued in the first year after the testator's death on such parts of the testator's estate as are invested at his death in the proper securities, and on such parts as are afterwards so invested within the same year; but that the income, before such investment, forms part of the capital of the residue. This case is in conformity with *Hewitt* v. *Morris* (*a*), to which Sir *Anthony Hart* referred; but the only question which seems to have been determined in that case was that, when the residue is left by the testator on securities such as he has by his will directed, the tenant for life shall have the interest. The question, what should be done with the interest of money not invested on what may be called proper securities, does not seem to have arisen in that case. It did arise in *Angerstein* v. *Martin*, and Lord *Eldon*, without distinguishing one part of the personal estate from another, gave to the tenant for life the interest from the death of the testator.

It is embarrasing to find the rule in cases of this nature so little settled. Lord *Eldon* seems to have considered the tenant for life entitled to the whole interest for the first year. Sir *John Leach* thought him entitled to no part of such interest. Lord *Lyndhurst* thought him entitled to such a sum by way of interest as would have accrued as dividends upon so much three per cents as the residue would have purchased at the end of the year; and Sir *Anthony Hart* thought him entitled to the interest, from the death, of that part of the residue which at the testator's death was invested on the securities pointed out by his will, but that the interest on such part of the residue as was not so invested was to be added to the capital.

In

(*a*) *Turn. & Russ.* 241.

1836.

DOUGLAS v. CONGREVE.

In a case where there is no direction to accumulate, and therefore no direction to add interest to capital, it appears to me more likely to have been the intention of the testator that, until the lapse of such convenient time as may be allowed to the executor to make the conversion directed by the will, the tenant for life should enjoy the interest actually accrued; and if it should be held, as in *Dimes* v. *Scott*, that the conversion ought to be made in a year, I think that no inconvenience can follow from allowing the tenant for life the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as shall elapse before the conversion of the residue according to the direction of the will.

See *Vickers* v. *Scott*, 3 *Mylne & Keen*, 500.

July 27.
Aug. 8.

TULLETT *v.* ARMSTRONG.

A testator devised and bequeathed certain copyhold and leasehold estates to trustees, upon trust to pay the rents and profits to *M. A.* for her life to her separate use, and without power of anticipation; and a testatrix gave certain freehold estates to trustees in trust for the same *M. A.* for her life, to her separate use, and without power of anticipation.

M. A. was a *feme sole* at the date of the testator's will, and of his death. She was also a *feme sole* at the date of the testatrix's will, but she was married at the death of the testatrix.

M. A. joined with her husband in granting annuities to the Plaintiff, charged upon the estates bequeathed by the testator, and the estates devised by the testatrix.

On the insolvency of the husband, a bill was filed by the Plaintiff to have the annuities paid out of the estates, and, upon motion for an injunction and receiver, the Court granted the motion as to the estates devised by the testator, but not as to those devised by the testatrix, on the ground that the rents of the former estates ought to be secured till the question in the cause could be determined, which could not be decided on an interlocutory motion.

THIS was a motion, on the part of the Plaintiff, that the Defendants *William Armstrong* and *Mary Augusta* his wife might be restrained from receiving the rents

rents and profits of the freehold, copyhold and leasehold estates, devised by the wills of the testator *Nathaniel Bradford* and the testatrix *Ann Bradford*, and for a receiver.

The testator *Nathaniel Bradford*, by his will, dated the 27th of *March* 1820 devised and bequeathed certain copyhold and leasehold estates to trustees upon trust to pay to, or permit and suffer his grand-daughter the Defendant *Mary Augusta Armstrong*, then *Mary Augusta Tilt*, and in his will called *Mary Tilt* spinster, to receive the rents and profits thereof for her life, in such manner that his said grand-daughter should not anticipate or dispose of her life estate, and so that no husband or husbands of his said grand-daughter should acquire any right or control over the said life estate, nor should the same be liable to the debts or engagements of any husband with whom she might intermarry. And the testator declared that the receipts of his said grand-daughter, notwithstanding any coverture, should alone be sufficient discharges to his trustees. And, after making some other bequests, the testator further declared his will and intention to be that the devises and bequests, thereby made by him to his said grand-daughter *Mary Tilt*, were so given and devised to her, free and clear, exonerated from and not subject to the rights, control, interference, debts, contracts, or engagements, of any husband, and were to be taken and received by her as if she were sole and unmarried, and so to be holden and enjoyed by her.

The testator died shortly after the date of his will, leaving his grand-daughter *Mary Augusta Tilt* then unmarried; and his will was duly proved by the executors named therein.

1836.

TULLETT v. ARMSTRONG.

Ann Bradford, the testator's daughter, made her will, dated the 27th of *August* 1826, whereby she gave and devised to trustees certain freehold hereditaments in trust for her niece *Mary Augusta Tilt* for her life, so and in such manner as that the said *Mary Augusta Tilt* should not sell or dispose of her life interest therein or any part thereof, or raise or borrow money thereon by anticipation, mortgage, or otherwise; and so and in such manner as that the rents, issues, and profits thereof should not be subject to the right, control, or interference of any husband whom the said *Mary Augusta Tilt* might marry, nor be liable to his debts, contracts, forfeitures, or engagements; and that any sale or disposition, raising money by mortgage or otherwise, of or upon her said niece's life-interest should be from time to time null and void.

The testatrix made a codicil, dated the 25th of *April* 1827, by which she confirmed her will, and she died in the month of *October* in the same year.

Mary Augusta Tilt intermarried with the Defendant *William Armstrong* on the 23d of *August* 1827. She was, therefore, a *feme sole* at the date of the will and codicil, and married at the death of the testatrix.

In *March* 1832, the Defendants, *William Armstrong* and *Mary Augusta* his wife, granted and appointed to the Plaintiff, during the life of *Mary Augusta Armstrong*, for the consideration therein mentioned, an annuity of 31*l.* 17*s.*, and charged the copyhold and leasehold estates devised and bequeathed by the will of *Nathaniel Bradford*, and the freehold hereditaments devised by the will of *Ann Bradford*, with the payment thereof.

In

1836.

TUILETT v. ARMSTRONG.

In the month of *September* in the same year the Defendants, *William Armstrong* and his wife, granted to the Plaintiff, during the life of Mrs. *Armstrong*, for the consideration therein mentioned, a further annuity of 31*l.* 17*s.*, and charged this annuity upon the same estates.

The annuities were duly paid down to the month of *December* 1834. In the month of *February* 1835 the Defendant *William Armstrong* took the benefit of the Insolvent Debtors' Act. The annuities being in arrear, the Plaintiff filed his bill for payment out of the rents and profits of the estates on which the annuities were charged. The Defendants, *Armstrong* and his wife, filed their answer on the 23d of *May* 1836.

Mr. *Teed*, in support of the motion, said that Mrs. *Armstrong*, being a *feme sole* at the date of the will of *Nathaniel Bradford* and at the death of the testator, the trust to her separate use, and the clause against anticipation, were inoperative. A gift to a single woman was as incapable of being fettered by restraints upon alienation as a gift to a man; and if there were no limitation over by way of forfeiture, she might dispose of the gift as she pleased, or transfer it by the act of marriage to her husband, notwithstanding any attempt, on the part of the donor or testator, to control or modify her enjoyment of it. That point had been decided by the Vice-Chancellor in *Newton* v. *Reid* (*a*), and his decision had been approved by Lord *Brougham* in *Brown* v. *Pocock* (*b*), and by the present Lord Chancellor, when Master of the Rolls, in *Massey* v. *Parker* (*c*). It was not necessary to determine the point judicially in

(*a*) 4 *Sim.* 141.
(*b*) 2 *Russ. & Mylne*, 210.
(*c*) 2 *Mylne & Keen*, 174.

1836.

TULLETT v. ARMSTRONG.

in *Massey* v. *Parker*, but it was raised expressly in *Stiffe* v. *Everitt* (*a*), where the testator gave his residuary estate to trustees upon trust to pay the interest to his daughter for her life to her separate use, and without power of anticipation, but with a power to make an appointment of the capital of the fund to take effect after her decease. The daughter was a *feme sole* at the date of the will and of the testator's death; and having afterwards married, she joined with her husband in petitioning the Court to have the fund transferred to her husband absolutely, offering at the same time to execute any appointment which the Court might think proper for that purpose. The petition was heard at the Rolls; and Lord *Cottenham*, after he became Lord Chancellor, disposed of it by refusing to make any order; not upon the ground that the limitation to the separate use of the daughter or the clause against anticipation had any operation, but because a husband and wife cannot effectually concur in disposing of the wife's entire life interest in a fund, when not settled to her separate use, that portion of it which she might enjoy in the event of her surviving her husband being reversionary, or in the nature of a reversionary interest, and, consequently, falling within the principle established by the cases of *Purdew* v. *Jackson* (*b*), and *Honner* v. *Morton* (*c*). That case, therefore, did not expressly decide the point; but it may be inferred from it that the Lord Chancellor saw no reason for altering the opinion he had given in *Massey* v. *Parker*.

With respect to the life-interest which Mrs. *Armstrong* was entitled to in the freehold property devised by *Ann Bradford*, she was a *feme sole* at the date of the will and codicil, when the will spoke with reference to real estate, and therefore the clause against anticipation was equally inoperative.

The

(*a*) 1 *Mylne & Craig*, 37. (*b*) 1 *Russ.* 1. (*c*) 3 *Russ.* 65.

The cases of *Barton* v. *Briscoe* (*a*), *Brandon* v. *Robinson* (*b*), *Woodmester* v. *Walker* (*c*), and *Jones* v. *Salter* (*d*), were also referred to.

Mr. *Wray*, *contrà*, submitted that this was a point of too great importance to be decided upon motion. *Massey* v. *Parker* (*e*), did not decide that a trust for the separate use of an unmarried woman was inoperative, because the Master of the Rolls was of opinion in that case, that there was no intention on the part of the testatrix to exclude the marital control, and the observations made upon a point which it was unnecessary to determine must be considered as extra-judicial. The point did arise in *Stiffe* v. *Everitt*, but in that case Lord *Cottenham* abstained from giving any express opinion upon it, refusing to make the order upon a different ground, namely, that the wife's possibility of survivorship was in the nature of a reversionary interest, and therefore not assignable. That was a sufficient reason for not deciding so important a point upon a petition, and could not be considered as an intimation of any final opinion on the point itself. In *Benson* v. *Benson* (*g*), where the point raised in *Massey* v. *Parker* might have arisen, the Vice-Chancellor expressed his unwillingness to decide it, unless he were obliged to do so; and he in fact disposed of the case upon a ground which rendered it unnecessary to decide that point. The observations, however, which he made in the course of the argument, shewed a strong leaning to the opinion which had generally prevailed among conveyancers, that an unmarried woman might be protected by a trust for her separate use, with a clause restraining her from anticipating her separate property. The Vice-Chancellor's decision in *Benson* v. *Benson* was appealed from, and affirmed by the Lords Commis-

(*a*) *Jac.* 603.
(*b*) 18 *Ves.* 429.
(*c*) 2 *Russ. & Mylne*, 197.
(*d*) 2 *Russ. & Mylne*, 208.
(*e*) 2 *Mylne & Keen*, 174.
(*g*) 6 *Sim.* 126.

1836.

TULLETT v. ARMSTRONG.

Commissioners, so that the important point, which might have arisen in that case, remained still undetermined. In *Davies* v. *Thornycroft* (*a*) the point came directly before the Vice-Chancellor, and he there held, that a trust for the separate use of a woman, whether single or married, was valid, and he rested his decision, as well upon the known practice of conveyancers, as upon the case of *Simson* v. *Jones* (*b*) before Sir *John Leach*, where, as was observed by the Vice-Chancellor, no question about the title could ever have arisen, if no such thing could exist as a trust for the separate use of a woman who afterwards married. In this state of the authorities, the Court, he submitted, could make no order upon this motion. As to the interest which Mrs. *Armstrong* derived under the will of *Ann Bradford*, she was a married woman at the death of the testatrix, and therefore, even if the proposition could be sustained, that a trust to the separate use of a single woman, with a clause against anticipation, will not attach upon her marriage, there was no pretence for extending the present application to the property which devolved upon her when she was a married woman, and in which, though she was a *feme sole* at the date of the will, she had no interest that might not have been defeated by a revocation until the death of the testator. He referred also to the cases of *Beable* v. *Dodd* (*c*), *Sockett* v. *Wray* (*d*), and *Anderson* v. *Anderson* (*e*).

Mr. *Teed*, in reply.

The MASTER *of the* ROLLS expressed his regret that a question of so much importance should be brought before him upon an interlocutory application, and said he would look into the cases.

On

(*a*) 6 *Sim.* 420.
(*b*) 2 *Russ. & Mylne*, 365.
(*c*) 1 *T. R.* 193.
(*d*) 4 *Bro. C. C.* 483.
(*e*) 2 *Mylne & Keen*, 427.

1836.

TULLETT v. ARMSTRONG. *Aug.* 8.

On a subsequent day his Lordship said that he had read the cases; and considering the insolvency of *Armstrong*, he thought that, as to the estates devised by the will of *Nathaniel Bradford*, the rents ought to be secured, till the question in the cause could be determined. Great doubt had lately been raised upon a subject which he believed had previously been considered to be settled. The question could not be decided on an interlocutory motion; but, in the present state of the authorities, he was of opinion that, for the purpose of security till the hearing, the Plaintiff was entitled to an injunction and receiver as to the estates devised by the will of *Nathaniel Bradford*, but not as to those devised by the will of *Ann Bradford*.

JENKINS *v.* PORTMAN.

April 16. 18.
May 30.

The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, though he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee as a ground for refusing the performance of a covenant in the original lease.

THE bill was filed by the executors of *Thomas Jenkins*, deceased, against the Defendant *Edward Berkeley Portman*, for the specific performance of an agreement; and it prayed that it might be declared, that the Plaintiffs were entitled to have a piece of ground, which was comprised in the articles of agreement dated the 14th of *August* 1810, and not comprised in the articles dated the 3d of *August* 1825, demised to them, at a pepper-corn rent for the remainder of a term of years mentioned in the agreement of 1810, in one or more lease or leases as they should choose; that the Defendant *Edward Berkeley Portman* might be decreed to execute such lease or leases accordingly, and otherwise perform the articles of *August* 1810, having regard to the articles of *August* 1825, the Plaintiffs being ready, on their part, to perform the same.

In

1836.

JENKINS v. PORTMAN.

In the year 1810, the Defendant, *Edward Berkeley Portman*, being tenant for life of the land in question, with a power of leasing, executed an indenture, dated the 14th of *August* 1810, and made between himself of the one part and *Thomas Jenkins*, the testator of the Plaintiffs, of the other part; and he thereby contracted with and agreed to let to *Thomas Jenkins*, for building messuages, &c., thereon, the piece of land thereinafter described, for the term of years, at the rents, and upon and under the terms and conditions, after mentioned; and *Edward Berkeley Portman* covenanted that he, his heirs and assigns, would, at the costs of *Jenkins*, from time to time, as any messuage should be built and covered in to a specified extent, demise to *Jenkins*, or as he should direct, such messuages as should be so built on the land, to hold the same when demised, and in the mean time to hold all the land from *Lady-day* 1810, for ninety-nine years at rents which, after the expiration of five years and a half, were to amount to 700*l.* a year. The rent was to be apportioned upon the houses as therein directed, and the apportionment was to be reserved upon the leases to be granted until the whole 700*l.* a year should be secured; and when the same should be secured, *Jenkins* was to be entitled to have the remaining ground, if any, demised to him at a pepper-corn rent in one lease or more as he should choose. *Jenkins*, on his part, covenanted to pay the rent; to build, according to a plan, 100 houses in five years; to make certain footways and roads; to make sewers in two years; to keep certain parts of the land as a nursery ground and garden, and to complete all the houses in seven years. And there was a proviso that *Edward Berkeley Portman*, his heirs, executors, &c., might re-enter, if default should be made by *Thomas Jenkins*, his executors, &c. in payment of the rent, or in case any of the covenants contained in the agreement

agreement on the part of *Jenkins*, his executors, &c. should not be performed.

Jenkins did not perform his engagements; and in the beginning of the year 1825 the Defendant was disposed to re-enter, and he accordingly commenced an action of ejectment for that purpose. *Jenkins* represented to the Defendant that he had expended large sums of money in the undertaking, though he was unable to complete it according to the plan originally contemplated and agreed to, and he requested further time, and permission to build smaller rate houses than had been at first intended; or, if Mr. *Portman* was resolved to resume possession of the building ground, *Jenkins* asked permission to retain that part of the ground which was used as a nursery ground and botanic garden at a pepper-corn, or, at least, at a very small rent. Mr. *Portman* referred this proposal to his solicitor, Mr. *Wilson*; the proceedings in ejectment were suspended, and *Jenkins* had time allowed him up to the 11th of *May* to make proposals for a new arrangement.

In the mean time, *James Thomson Parkinson*, who had been occasionally employed by Mr. *Portman* as an architect and builder, and who was engaged in building speculations on his own account, was desirous of obtaining the ground comprised in *Jenkins*'s agreement, and made proposals for that purpose to Mr. *Portman*, who did not accede to them, because the treaty with *Jenkins* was then proceeding; and soon afterwards *Parkinson* entered into an agreement with *Jenkins*, and on the 23d of *May* he wrote a letter to Mr. *Portman*, stating that he had concluded a bargain with *Jenkins* for all his building ground, subject to Mr. *Portman*'s approbation. The matter, however, continued in treaty for some time longer; variations in the plan of building were

1836.

JENKINS v. PORTMAN.

were proposed by Mr. *Parkinson*, and agreed to by Mr. *Wilson*, the solicitor of Mr. *Portman*, who also acted as the solicitor of both *Jenkins* and *Parkinson*. On the 7th of *July*, Mr. *Wilson*, on the behalf of Mr. *Portman*, approved expressly of the varied plan of building, and finally on the 3d of *August* 1825, articles of agreement between *Jenkins* and *Parkinson* were executed.

By those articles of agreement *Jenkins* covenanted with *Parkinson* that he, his executors, &c., would, at the cost of *Parkinson*, as often as one or more of the houses should be built, demise to *Parkinson*, his executors, &c., or as he appointed, all such messuages or tenements as should be erected, to hold to *Parkinson*, his executors, &c., for the term of eighty-three years and one quarter, wanting twenty days from the 24th of *June* 1835, at the rent of a pepper-corn for the first year and one half of another year, and at the clear net yearly ground-rent of 900*l.* for the residue of the said term, the same to be apportioned among the houses, as therein mentioned, and the apportionment to be reserved in the lease to be granted until the whole of the ground-rent should be secured; and when the same should be so secured, *Parkinson* was to be entitled to have the remaining ground, if any, demised to him at a pepper-corn rent in one lease or more, as he should choose. And *Parkinson* covenanted to pay the rent, and within three years from the date thereof to lay out the ground, and to build houses pursuant to a plan to be approved by the original ground-landlord; and all the buildings were to be fit for habitation in five years. The articles contained a proviso, that in case default should be made by *Parkinson*, his executors, &c., in payment of rent or in any of the covenants thereby covenanted to be performed, it should be lawful for *Jenkins*, his executors, &c., to re-enter.

Upon

1836.
JENKINS v. PORTMAN.

Upon the execution of this agreement, *Parkinson* was let into possession of the ground therein comprised, which was the ground intended to be built upon according to the new plan. *Jenkins* continued in possession of the nursery ground not intended to be built upon, and which was the ground in question in the cause.

In the year 1827 *Parkinson* had, in part performance of his engagements, built a number of houses on the ground comprised in the articles of 1825, of which houses Mr. *Portman* granted leases at ground rents amounting to 700*l.* a year. *Parkinson*, being in want of money to carry on his building speculations, and expecting to realise ground rents to the amount of 1000*l.* a year in the course of two years, made a proposal to Mr. *Portman* for the sale of his expected ground rents to that amount, for the sum of 14,500*l.*: but as such ground rents might not be secured, part of the proposal was that *Parkinson* should assign his interest in the property to a trustee for Mr. *Portman* in order to secure to Mr. *Portman* the re-payment of the sum of 14,500*l.*, or a proportionate part thereof, in case ground rents to the amount of 1000*l.* a year, or the whole of that amount, should not be secured.

The proposal was accepted, and by an indenture, dated the 3d of *November* 1827, and made between *James Thomson Parkinson* of the first part, *Edward Berkeley Portman* of the second part, and *Edmund Alexander Wilson* of the third part, after reciting the indenture of the 3d of *August* 1825, and several other indentures under which *Parkinson* had entered into engagements in building transactions, and after reciting that *Parkinson* would at *Christmas-day* then next under the agreement with *Jenkins* have demised to him at a pep-

per-

1836.

JENKINS v. PORTMAN.

per-corn rent pieces of land on which ground rents to the amount of 1000*l.* a year might be secured, and had entered into articles of agreement for demising such pieces of land to various persons at various ground rents amounting to 1000*l.* a year, and had agreed to sell such ground rents when secured to Mr. *Portman* for the sum of 14,500*l.*, and that for the purpose of building the houses it would be advantageous that the 14,500*l.* should be then paid, and that *Parkinson* should covenant to secure the 1000*l.* a year ground rents, and should also (to secure the re-payment of the 14,500*l.* if the 1000*l.* a year ground rents should not be secured), assign to *Wilson* all his estate and interest in the pieces of ground, and the houses comprised in the indenture of the 3d of *August* 1825, and the other houses and grounds therein mentioned, it was witnessed that, in consideration of the 14,500*l.* then paid by Mr. *Portman*, *Parkinson* covenanted that he would proceed to secure the 1000*l.* a year ground rents, and for that purpose would build, &c. and would, when required, procure to be granted to a trustee for Mr. *Portman* the leases at a pepper-corn rent, which he would be entitled to under his agreement with *Jenkins*, and would accept under-leases of the same. But if a sufficient number of houses should not be built to secure the 1000*l.* a year ground rents to Mr. *Portman*, then it was agreed that *Parkinson* should repay a proportionate part of the 14,500*l.* And it was further witnessed that, in consideration of the 14,500*l.* then paid by Mr. *Portman*, *Parkinson* sold and assigned to *Edmund Alexander Wilson* all his estate, right, title, and interest, claim and demand in the land comprised in the indenture of the 3d of *August* 1825, and the buildings then or thereafter to be erected thereon, and various other lands and buildings, and certain sums of money mentioned in the deed, to hold the same to *Edmund Alexander*

1836.

JENKINS v. PORTMAN.

Alexander Wilson on the trusts thereinafter mentioned; that is to say, upon trust, if the 1000*l.* a year ground rents should be secured, to re-assign to *Parkinson* as therein mentioned, and if in two years the ground rents should not be secured, but only a part thereof, and if Mr. *Portman* should elect to take such part, and if *Wilson* should have received money to pay to Mr. *Portman* the residue of the 14,500*l.* after deducting a proportionate part of the rents in part of the 1000*l.* a year ground rents, in trust out of such monies to pay that residue, and to re-assign the rest of the property to *Parkinson*; but, if part only of the 1000*l.* a year ground rents was secured, and Mr. *Portman* refused to accept the same, and *Wilson* had not received any money, or sufficient money to repay the whole of the 14,500*l.* then what he had received, if any thing, was to be applied in part discharge of the 14,500*l.*, and the estate and property assigned were to be held by *Wilson* in trust, if required by Mr. *Portman*, to sell, in order to raise money for the purpose of paying what was due to Mr. *Portman*, and to pay any surplus to *Parkinson*. And by the same deed *Parkinson* covenanted that, until the 1000*l.* a year ground rents should be secured, he would pay interest at 5 per cent. on the 14,500*l.*, or so much thereof as, according to the contract, and the performance of the covenants, should remain due; and *Parkinson* further covenanted that, in the event of the ground rents not being secured, and any money remaining due on the security of the indenture, *Parkinson* would, until *Wilson* should be in the actual possession of the lands and houses, pay the rents, and perform the covenants reserved and contained in the recited agreements (among which was the agreement of the 3rd of *August* 1825), and indemnify *Wilson* and Mr. *Portman* and each of them from the same.

Mr. *Portman* paid the 14,500*l.* on the execution of these articles of agreement. *Parkinson* secured only

1836.

JENKINS v. PORTMAN.

399*l.* 4*s.* ground rents on the land comprised in the articles of 1827, became insolvent, and went abroad. *Wilson* never entered into possession under the covenant contained in the articles of 1827. It was not disputed on the part of the Defendant, that the 700*l.* a year, ground rents, agreed to be secured to him by *Jenkins*, had been secured.

The Defendant by his answer said that he was willing to grant to the Plaintiffs such peppercorn lease as the Plaintiffs sought by their bill, provided they would consent to such lease including those parts of the land comprised in the articles of *August* 1825, which had not been covered with buildings in conformity with the plan signed and approved by the Defendant, and containing proper covenants for the erection and completion of such buildings; or if the Plaintiffs would accept separate leases, or a separate lease of such last-mentioned parts of the land at a peppercorn rent, with proper covenants for the erection and completion of the said buildings. The Defendant further said that he did not insist that the stipulations and agreements, on the part of *Jenkins*, contained in the articles of the 14th of *August* 1810, should be complied with before he should grant such peppercorn lease as the Plaintiffs sought, nor did he wish to bind the Plaintiffs to the execution of the plan mentioned in that agreement, and signed and approved by him; but he was willing to give them their choice either to execute the plan, and perform the covenants in the articles of agreement of the 14th of *August* 1810, covenanted to be performed by *Jenkins*, before he was to become entitled to the peppercorn lease, or to perform the covenants contained in the articles of the 3d of *August* 1825.

The question in the cause was, whether the Defendant was bound to perform the covenant contained in the agreement

1836.

JENKINS v. PORTMAN.

agreement with *Jenkins* of *August* 1810, or whether he could resist the performance of that covenant, by reason of the failure of *Jenkins* to perform the original undertaking, and of the non-performance of the covenants contained in the agreement of *August* 1825 by *Parkinson*, of whose interest the Defendant had himself become the equitable assignee.

Mr. *Pemberton* and Mr. *Stuart*, for the Plaintiffs.

It is admitted that the Defendant has a clear rental of 70*l.* a year secured to him, and the question is whether, that condition of the articles of 1810 having been fulfilled, the Defendant is not bound by his covenant to grant to the Plaintiffs a lease or leases at a peppercorn rent of the nursery ground, on which no buildings were to be erected, and which is not included in the articles of 1825. The objections raised by the Defendant are first, that in the articles of 1810 there are covenants to make roads, and erect buildings, &c. in other parts of the land, not now the subject of dispute, which have not been performed by *Jenkins;* and secondly, that the covenants in the agreement of 1825, which was substituted for that of 1810, and acquiesced in by Mr. *Portman*, have not been performed by *Parkinson*, who is insolvent, and has gone abroad. The answer to the first of these objections is, that the covenants in the two agreements are not only not dependent upon each other, but that the effect of the articles of 1825, to which Mr. *Portman* was substantially a party, was to introduce a total variation in the plan of building, and to render the performance of those covenants in the articles of 1810, which related to the land on which buildings were to be erected, absolutely impossible. By the adoption of the agreement of 1825, Mr. *Portman* consented to transfer from *Jenkins* to *Parkinson* the per-

1836.

JENKINS v. PORTMAN.

formance of a different set of covenants, applicable to an entirely different plan of buildings. As to the other objection, that the covenants in the substituted articles of 1825 have not been performed by *Parkinson*, Mr. *Portman* has, by taking an equitable assignment of all *Parkinson*'s interest, rendered himself liable to all the obligations which were imposed upon *Parkinson*. The effect of the assignment of *Parkinson*'s interest, by the deed of 1827, to a trustee for Mr. *Portman*, is to place Mr. *Portman* exactly in the same situation as *Parkinson*, and to clothe him in equity with all the obligations which *Parkinson* was bound to perform. That the equitable assignee of a lease is liable to perform the covenants contained in it, was determined in the case of *Lucas* v. *Comerford*. (*a*) In that case the lessor filed a bill against the depositary of the lease, for the specific performance of a covenant in the lease to rebuild; and the Court ordered the Defendant to take an assignment of the lease, that the Plantiff might have his legal remedy. It is immaterial, in the present case, that *Wilson* has not entered into possession; for it has been decided that the assignee of a lease, whether the assignment be absolute, or by way of mortgage, is liable to perform the covenants contained in it, though he has never taken possession of the demised premises; *Williams* v. *Bosanquet*. (*b*) In a late case of *Flight* v. *Bentley* (*c*), the point came expressly before the Vice-Chancellor. There the defendants, *Bentley* and Co., took a deposit of an under-lease by way of security for a debt, from a person who afterwards became insolvent. *Bentley* and Co. did not take possession of the premises; and upon an application to them by the assignees of the original lease to deliver up the under-lease, and notice that

(*a*) 3 *Bro. C. C.* 166. *S. C.* 1 *Ves.* jun. 235.

(*b*) 1 *Bro. & Bing.* 238.

(*c*) now reported in 7 *Sim.* 149.

1836.

JENKINS v. PORTMAN.

that they would otherwise be liable to the rent and covenants, they refused to do so without consideration. The assignees filed their bill, praying that the defendants, as equitable mortgagees of the under-lease, might be decreed to pay the rent and perform the covenants therein contained; and the Vice-Chancellor held that defendants were liable, and made a decree accordingly. Whether the assignee of a lease takes the assignment by way of security for a debt, or otherwise, is immaterial; he is equally liable to the covenants contained in it. Lord *Mansfield*, indeed, was of opinion that a mortgagee of a lease, who did not enter into possession, was not liable to the lessor; *Eaton* v. *Jacques* (*a*); but that opinion has been long since over-ruled, and it is now settled that an assignee by way of mortgage, both at law and in equity, stands exactly in the same situation, in respect of his liability to the covenants contained in the lease, as an absolute assignee: *Williams* v. *Bosanquet* (*b*): *Casberd* v. *The Attorney-General.* (*c*)

Mr. *Kindersley* and Mr. *Chandless*, *contrà*.

The articles of *August* 1810 shew the nature of the contract between Mr. *Portman* and Mr. *Jenkins*. Mr. *Portman*'s object was, to demise the property in such a way as to secure the building of a certain number of houses in a reasonable time, from the letting of which, at low ground-rents, he would derive a very moderate income until the leases should fall in, and ultimately obtain a large rental. *Jenkins*, on his part, covenanted to build a certain number of houses, in conformity with a plan approved by Mr. *Portman*, on a part of the land within six years; to make roads, and to cover in a hundred houses within seven years. It was of great importance to Mr. *Portman*

(*a*) *Doug.* 455.
(*b*) 1 *Bro. & Bing.* 238.
(*c*) 6 *Price*, 411.

1836.

JENKINS v. PORTMAN.

Portman that these covenants should be performed within the stipulated time. *Jenkins* failed to perform his engagements; and Mr. *Portman* commenced an action of ejectment to recover possession of the premises. The articles of 1825 were afterwards entered into between *Jenkins* and *Parkinson*; and it is said that Mr. *Portman* was substantially a party to those articles, and that the performance of the covenants into which *Jenkins* had entered, subject to certain variations in the original plan, was transferred, with Mr. *Portman*'s acquiescence, from *Jenkins* to *Parkinson*. It is true that Mr. *Portman* discontinued the proceedings in the action of ejectment; but he was no actual party to the articles of 1825, and there was no waiver on his part of his legal rights against *Jenkins*. *Jenkins* did not assign the whole of his interest, but only made an under-lease to *Parkinson*. Mr. *Portman* so far acquiesced in the articles of agreement, under which *Parkinson* was to continue the buildings according to an altered plan, that he did not eject *Jenkins*, as he might have done; and the return which *Jenkins* makes for this lenity and forbearance, is to insist in this suit that, though neither he nor *Parkinson* have performed their engagements, and both plans remain unexecuted, yet he is entitled, inasmuch as ground-rents to the amount of 700*l.* a year have been secured to Mr. *Portman*, to all the benefit which he might have claimed, had the buildings been carried to that extent under the original articles. Mr. *Portman* insists, by his answer, that he is entitled to have one of the two plans completed, or to have security for the completion of one of the two, before he can be called upon to grant a lease or leases of a part of the land, at a peppercorn rent, to *Jenkins* or his representatives. Nothing can be more reasonable than this demand of Mr. *Portman*, or more inequitable than the ground upon which that demand is resisted on the part of the Plaintiff, which is no other than this; that, because

1836.

JENKINS v. PORTMAN.

cause Mr. *Portman* has taken an assignment by way of security from *Parkinson*, he has clothed himself with all the obligations both of *Parkinson* and *Jenkins*. Can such an argument be maintained in a court of equity, as that, because Mr. *Portman* has taken an assignment of *Parkinson*'s interest by way of security, his rights are converted into liabilities; that he stands in the place of both defaulters, *quoad* their liabilities; and that one of those defaulters is entitled to say to him, "You are bound to give me all the benefit of a part performance of the contract, to which I should have been entitled had no default ever been made." This argument, though urged at the bar, is inconsistent with the frame of the bill; for the Plaintiffs say that they are ready, on their parts, to perform the articles of 1810. The assignee of a lease is, no doubt, liable to perform the covenants contained in the lease; and, at law, it makes no difference whether the assignment is of the whole interest, or by way of mortgage. But equity takes a distinction, where the assignment of the term is only by way of security for a debt; and the Court will not assist the lessor where the mortgagee has not taken possession; *Sparkes* v. *Smith*. (*a*) In *Pilkington* v. *Shaller* (*b*) the rent was recovered by the lessor against the assignee by way of mortgage of a lease who had never entered, and lost the money lent, and the Court refused to relieve against the recovery; but the authority of that case has been doubted. In *Lucas* v. *Comerford* (*c*), the mortgagee had taken possession. Lord *Mansfield* felt so strongly the justice and reasonableness of the distinction recognised in *Sparkes* v. *Smith*, that he endeavoured to introduce the same principle at law in the case

(*a*) 2 *Vern.* 275.
(*b*) 2 *Vern.* 374.
(*c*) 3 *Bro. C. C.* 166. *S. C.* 1 *Ves.* jun. 235.

1836.

JENKINS v. PORTMAN.

case of *Eaton* v. *Jacques* (*a*). The doctrine in *Lucas* v. *Comerford* applies only to covenants running with the land; and is inapplicable to the present case. There is no assignment of *Jenkins*'s entire interest to *Parkinson*; *Jenkins* granted only an under-lease; and the mortgagee of an under-lease is not bound by the covenants contained in the original lease either at law or in equity, unless, indeed, the unpublished case of *Flight* v. *Bentley*, which may not be accurately stated at the bar, is to be taken as an authority. There is nothing in the agreement between *Jenkins* and *Parkinson* to prevent Mr. *Portman* from pursuing his remedies at law by suing the representatives of *Jenkins* upon the covenants contained in the articles of 1810. The Plaintiffs could not set up a defence of accord and satisfaction, for there is no instrument to which *Portman* is a party to displace the deed of 1810; such a defence, therefore, would fail upon the principle mentioned in *Blake's Case* (*b*), *Nihil tam conveniens est naturali equitati quam unumquodque dissolvi eo ligamine quo ligatum est.* *Jenkins* could have no relief in a court of equity against such a proceeding at law, on the ground that the second agreement was substituted for the first; because he must do equity to obtain relief; and he could have no pretence for seeking relief, still less can he have any pretence for requiring a benefit, as he now does, except upon the terms of fulfilling one set of obligations or the other. There is no privity whatever between *Jenkins* and *Portman* in respect of the contract entered into between *Parkinson* and *Portman*. *Jenkins* is an entire stranger to that contract; why then should he obtain a benefit from it? or upon what principle of law or justice can he acquire a right by the operation of a contract

(*a*) *Dougl.* 455. (*b*) 6 *Co.* 43. *b.*

contract to which he is neither party nor privy, which the contracting parties never intended he should acquire, and which, but for that contract, it is admitted that he was not in a situation to claim? This case is entirely distinguishable from *Lucas* v. *Comerford:* there the plaintiff sought the assistance of the Court to enable him to prosecute his legal rights; here the Plaintiffs seek to obtain new rights, and call upon the Court to declare that the Plaintiffs, who represent one of the defaulters, shall reap the same benefit as if no obligations had been broken; and that the Defendant, who has suffered by the default, shall stand in the place of the defaulters, and be deprived of all his remedies against the Plaintiffs.

Mr. *Pemberton*, in reply.

The substantial question is, has Mr. *Portman* had rents to the amount of 700*l.* a year secured to him, upon the performance of which stipulation he covenanted to grant to *Jenkins*, or his representatives, a lease or leases at a peppercorn rent? It is not denied that he has obtained rents to that amount: how, then, can he justly refuse to execute his part of the contract? It was no part of the consideration upon which Mr. *Portman* was to perform his covenant, that all the buildings should be erected; on the contrary, it was the plain intention of the parties to the original agreement, that *Jenkins* should have this grant, that he might be the better enabled to complete the rest of the undertaking. His representatives state that they are ready on their part to perform the articles of 1810; and this, as far as it is now practicable, they are ready to do. They are ready to execute a counterpart of the lease, and to perform such covenants in the articles of 1810 (if any) as the Defendant himself has not rendered it

1836.
JENKINS v. PORTMAN.

it impossible to perform by his adoption of a plan entirely different from that originally agreed upon. Mr. *Portman* has undoubtedly placed himself in the situation of *Parkinson;* and, in calling upon the representatives of *Jenkins* to fulfil the obligations of *Parkinson*, he is calling upon them to fulfil obligations which he has himself incurred. *Wilson* would be liable at law, but he is a mere trustee, and would be entitled to be indemnified by Mr. *Portman;* so that Mr. *Portman* is, in effect, the person who is liable for all the obligations which he seeks to throw upon the Plaintiffs. The decision in *Sparkes* v. *Smith* (*a*) consists as little with the law of this Court, acted upon in more recent cases, as does the doctrine, which was attempted to be introduced by Lord *Mansfield* in *Eaton* v. *Jacques*, with the subsequent decisions in courts of common law. *Lucas* v. *Comerford* and *Flight* v. *Bentley* are direct authorities for the Plaintiffs.

May 30.

The MASTER *of the* ROLLS (after stating the facts prior to the execution of the articles of agreement of *August* 1810, and the substance of those articles).

Although Mr. *Portman* was not a formal party to the agreement of the 14th of *August* 1810 between *Jenkins* and *Parkinson*, he ceased, upon the execution of this agreement, to proceed against Mr. *Jenkins;* and it is plain that a considerable change had taken place in the relative situations of Mr. *Portman* and Mr. *Jenkins.*

The former obligation of *Jenkins* to Mr. *Portman* was, to build according to a certain plan in a certain time. He

(*a*) 2 *Vern.* 275.

1836.

JENKINS v. PORTMAN.

He had failed to perform this obligation, and in consequence of that default, Mr. *Portman* had certain rights. The agreement of 1825, entered into with the knowledge of Mr. *Portman*, changed this relation between the parties. Mr. *Portman*, after the expiration of the time given for the completion of the first plan, agreed to a new plan. The new plan required time for its completion: what time did Mr. *Portman* allow? The answer is, that he had personal notice of an agreement between *Jenkins* and *Parkinson*; he approved of the new plan for building by his solicitor, who was also the solicitor of *Jenkins* and *Parkinson* in preparing the agreement between them. By that agreement, five years were allowed to complete the new plan: *Parkinson* was to take the building ground, and to build upon it. The ground not to be built upon by the new plan was to be left in the possession of *Jenkins*. Under these circumstances, I cannot consider Mr. *Portman* as a stranger to the agreement between *Jenkins* and *Parkinson*, or as not affected by it. I am of opinion that, after that agreement was so executed, Mr. *Portman* would not have been at liberty to act upon the right which he had previously acquired by *Jenkins*'s default under the agreement of 1810.

The consequences of that default were, in effect, waived; but the agreement of 1810 was not rescinded, nor was its operation altogether superseded. *Jenkins*, with the consent of *Portman*, had agreed to grant an under-lease of all the building ground, but retained possession of the ground not intended to be built upon. Of this piece of ground the deed of *August* 1810 entitled him to a lease at a peppercorn rent, when Mr. *Portman*, according to the terms of that agreement, had granted leases at ground-rents amounting to 700*l.* a year; and after the terms of that agreement had been varied

1836.

JENKINS v. PORTMAN.

varied by the deed of *August* 1825, I see no reason to think that *Jenkins* was not entitled to a like lease of the ground not intended to be built upon, when Mr. *Portman*, according to the terms of the deed of *August* 1810 as modified by the deed of *August* 1825, had granted leases at ground rents, amounting to the same sum. On the contrary, it appears to me that, if *Parkinson* had committed no default, and had built houses, of which Mr. *Portman* had granted leases at ground-rents amounting to 700*l.* a year, *Jenkins* would thereupon have become entitled to a lease of the ground not intended to be built upon at a peppercorn rent. But *Parkinson* committed default: he did not build according to his engagements; he became insolvent, and absconded; but, in part performance of his engagements, he did build houses on ground comprised in *Jenkins*'s agreement, and of the houses so built Mr. *Portman* granted leases at ground-rents amounting to 700*l.* a year; and, besides, certain transactions took place between Mr. *Portman* and *Parkinson*, of such a nature as to make a new variation in the relative situation of the parties. (Here his Lordship stated the proposal made by *Parkinson* to Mr. *Portman* for the advance of the sum of 14,500*l.*, and the substance of the indenture of the 3d of *November* 1827, by which that proposal was carried into effect.)

Upon the execution of this deed, Mr. *Portman* paid the 14,500*l.* to *Parkinson*, and *Parkinson* proceeded for some time to perform his covenants. What he did on the whole, as I understand the facts, was to secure to Mr. *Portman* rents, received on leases of houses built on ground comprised in *Jenkins*'s agreement, to the amount of 700*l.* a year, and on ground comprised in the deed of 1827, but not in *Jenkins*'s agreement, to the amount of 399*l.* 4*s.* a year. He did no more; and a considerable part of

1836.

JENKINS v. PORTMAN.

of the building ground comprised in the deeds of *August* 1810 and *August* 1825 remains unbuilt upon. Under these circumstances, the executors of *Jenkins* file their bill, and what they allege is in substance this:—Mr. *Portman* has obtained ground-rents to the amount of 700*l.* a year, pursuant to the deed of 1810, and ought to grant a lease at a peppercorn rent of the only ground which remains to be leased under the same deed. Mr. *Portman* does not deny that he has obtained the ground-rent of 700*l.* a year; neither does he deny the right of Mr. *Jenkins* to have a lease of the piece of ground in question. He is willing, he says, to grant such lease as the Plaintiffs desire, provided they will consent to such lease including such parts of the lands comprised in the deed of the 3d of *August* 1825 as have not been covered with buildings in conformity with the plan signed and approved of by the Defendant, with proper covenants for the erection and completion of such buildings; or, if not in conformity with that plan, in conformity with the covenants of the deeds of *August* 1810.

I think it clear that Mr. *Portman* has not now any right to call upon the Plaintiffs to perform, or covenant to perform the stipulations of the deed of 1810, which have been varied in the manner I have stated; and the question is, whether he has a right to call upon the Plaintiffs to perform, or covenant to perform the stipulations of the deed of *August* 1825 which were covenanted to be performed by *Parkinson*. As to this, the Plaintiffs say that Mr. *Portman* purchased and took an assignment to a trustee for himself of the whole of *Parkinson*'s interest, and, becoming entitled to *Parkinson*'s whole interest, he at the same time became subject to *Parkinson*'s covenants and obligations, and towards *Jenkins* became bound to do that which *Parkinson* was previously bound to do; and, consequently, cannot now call

1836.

JENKINS v. PORTMAN.

call on the Plaintiffs to do that which has, in fact, become his own duty. By the deed of 1827, it is clear that *Parkinson* did assign all his interest under the deed of *August* 1825 to Mr. *Wilson*, the trustee; and, in the events which have happened, it is clear that Mr. *Wilson* has become a trustee for Mr. *Portman*, to secure to him what remains due in respect of the 14,500*l.*

Upon the subject of the liability which accrued to Mr. *Portman* under the deed of 1827, the case of *Lucas* v. *Comerford* (*a*) was cited to shew that, even in the case of an equitable mortgage by deposit of deeds, the depositary was held bound by an agreement to rebuild, and was compelled to take an assignment with covenants for that purpose. The authority of that case was not denied; but it appears by *Brown's Report*, that the equitable mortgagee, in that case, had taken possession of the mortgaged estate; and it was argued that, in equity, a mortgagee, by assignment of the whole leasehold interest, did not become liable to the covenants of the lease if he did not take possession; and the cases of *Sparkes* v. *Vernon* (*b*), and *Eaton* v. *Jacques* (*c*), which was expressly overruled at law in *Williams* v. *Bosanquet* (*d*), were cited as shewing the rule in equity. The case of *Pilkington* v. *Shaller* (*e*), and an anonymous case in *Freeman* (*g*), were also cited; but it does not appear to me that the fact of a mortgagee by assignment of a leasehold interest taking actual possession of the mortgaged property is more important in equity than it is at law; and the unpublished case of *Flight* v. *Bentley*, cited by Mr. *Stuart*, shews that it was not so considered by the Vice-Chancellor. In that case, *Flight*, the plaintiff, repre-

(*a*) 3 *Bro. C. C.* 166. *S. C.* 1 *Ves.* jun. 235.
(*b*) *Dougl.* 455.
(*c*) 1 *Brod. & Bing.* 238.
(*d*) 2 *Vern.* 275.
(*e*) 2 *Vern.* 374.
(*g*) 2 *Freem.* 253.

represented the original lessee of the estate in question. *Postlethwaite* was an under-lessee; and he deposited his under-lease with *Bentley* and Co., as a security for the repayment of a sum of money. After the insolvency of *Postlethwaite*, *Flight* demanded the rent of *Bentley* and Co., who at first refused either to pay rent, or to give up the lease without payment of what was due to them. *Flight* then filed his bill. *Bentley* and Co., by their answer, stated that they had never taken possession, or received rent; that they claimed no interest, and were willing to give up the lease; and therefore submitted that they never had been, and were not liable as assignees to the rent and covenants of the lease. The Vice-Chancellor declared that they were liable to the covenants, and decreed payment of the rent.

On the whole, therefore, I am of opinion that Mr. *Portman* is not entitled to call on the Plaintiffs for any further performance of the covenants of either the deed of *August* 1810, or the deed of *August* 1825; and that the Plaintiffs are entitled to the relief they pray.

The decree must be, that Mr. *Portman* execute to the Plaintiffs a lease, and that the Plaintiffs execute a counterpart of a lease of the piece of land in question. Mr. *Portman* must pay the costs of the suit; and the lease must be settled by the Master, if the parties differ.

1837.
Jan. 27, 28.
Feb. 15.

BEHRENS *v.* PAULI.

Plea, that a verdict and judgment in the Lord Mayor's Court had been obtained by the Defendant against the Plaintiffs on the same matter in respect of which relief was sought by the bill, allowed, the Lord Mayor's Court being a court of competent jurisdiction to decide the matter in dispute between the parties, and that matter in dispute, if not finally decided by the judgment, being in a proper course for decision.

THE bill was filed by persons representing themselves to be the assignees of Messrs. *Beel* and *Whittaur*, late of *Lubeck*, merchants, but now bankrupts; and it prayed that an account might be taken of the mercantile dealings between *Beel* and *Whittaur* and the Defendants *Pauli* and *Jones*; that the balance of such account might be ascertained, and the amount thereof paid to the Plaintiffs; and that the Defendant *Von Melle* might be restrained from further proceedings in the court of the Lord Mayor of *London* to recover the monies in the hands of *Pauli* and *Jones* belonging to the estate of the bankrupts.

The bill stated that, in the course of dealings which had taken place between *Beel* and *Whittaur* and *Pauli* and *Jones*, a balance of 104*l.* 19*s.* and upwards became due to *Beel* and *Whittaur*, and was due to them at the time of their bankruptcy. That in *February* 1836, *Beel* and *Whittaur* stopped payment. That on the 25th of *March* 1836, the Defendant *Von Melle*, alleging that *Beel* and *Whittaur* were indebted to him in the sum of 1500*l.*, commenced an action against them for that sum in the Lord Mayor's court, and on the same day, according to the custom of the city, attached the monies of *Beel* and *Whittaur* in the hands of *Pauli* and *Jones*. That the insolvency of *Beel* and *Whittaur*, or their bankruptcy was declared on the 2d of *April* 1836; and that the Plaintiffs became, and now were, assignees of their estate and effects.

The

1837.

BEHRENS v. PAULI.

The bill further stated, that *Von Melle* was proceeding in the action to recover the money in the hands of *Pauli* and *Jones*, and that he might do so, by the custom of the city of *London*, to the prejudice of the general creditors of the bankrupts. And it charged that, before the 25th of *March*, *Von Melle* had heard that *Beel* and *Whittaur* had stopped payment, and that they were in insolvent circumstances; and that he had notice of the declaration of insolvency soon after the 2d of *April*, when it took place.

The Defendant *Von Melle* pleaded that, *Beel* and *Whittaur* being indebted to him, he brought his action in the Lord Mayor's court of the city of *London*, according to the custom of the said court, and prayed process, according to the said custom, to attach the sum of 104*l.* 19*s.*, due to *Beel* and *Whittaur*, in the hands of *Pauli* and *Jones*, as garnishees. That *Pauli* and *Jones* pleaded a plea to the effect that no debt was due from them; and that issue was thereupon joined. That afterwards, on the 7th of *May* 1836, the Plaintiffs in this cause came into the Lord Mayor's court, and filed a bill of proof, and thereby prayed to be admitted to prove the same according to the custom of the city. That on the 21st of *May* 1836, the Plaintiffs filed in the Lord Mayor's court a probation, which is a statement of the facts on which the party claims to be entitled to the money in question. That such probation was replied to by *Von Melle*, whereupon issue was joined, and the cause was tried before the Recorder and a jury, according to the custom of the city; and that the verdict found by the jury was, that the sum in question, viz. the 104*l.* 19*s.*, was not the property of the Plaintiffs in manner and form by them alleged. The plea then stated, that upon the verdict judgment had been entered up according to the custom of

1827.
BEHRENS
v.
PAULI.

the court, and that the judgment was a subsisting and effectual judgment, and not reversed or in any manner made void. The plea then averred, that the sum of money mentioned in the bill filed by the Plaintiffs in this Court was the same sum which was mentioned in the declaration in the action brought in the Lord Mayor's court, and in the bill of proof and probation; and submitted that the verdict and judgment ought to be held conclusive against the Plaintiffs as to their right, and that the Defendant was entitled to the benefit of them in bar to the bill.

Mr. *Pemberton* and Mr. *O. Anderdon*, in support of the plea.

The Defendant *Von Melle* having commenced an action in the Lord Mayor's Court against *Beel* and *Whittaur*, and having attached monies of *Beel* and *Whittaur* to the amount of 104*l.* 19*s.* in the hands of *Pauli* and *Jones* according to the custom of the city of *London*, the Plantiffs, who, after the commencement of such action, and upon the bankruptcy of *Beel* and *Whittaur*, became their assignees, intervened in the Lord Mayor's court, and filed their bill of probation, by which they claimed to be entitled to the money in question, to which bill the Defendant pleaded a plea equivalent to a plea of *nil debet*. The Plaintiffs replied, and thereupon issue was joined between the parties. The cause was tried in the Lord Mayor's court; a verdict was found for the Defendant, and judgment against the Plaintiffs has been duly entered up. The issue tendered by the Plaintiffs in their bill of probation was the same issue as that which they tender by their bill filed in this Court; and the plea that the matter in dispute has been determined by a court of competent jurisdiction, is, according to the rules of pleading in this Court, and upon the authority of decided cases, a good plea; Lord *Redesdale's Treatise*

1837.

BEHRENS v. PAULI.

Treatise on Pleading (*a*), *Beames on Pleas.* (*b*) It is only in very strong cases that the Court will relieve against a verdict, as in the case put by Lord *Hardwicke*, where the plaintiff's action might be for a debt, and the defendant, after the verdict, discovers a receipt for the very demand in the action; *Williams* v. *Lee.* (*c*)

Mr. *Tinney* and Mr. *Randell*, *contrà*.

The plea is bad both in point of form and of substance. It does not state that either the goods or the garnishees are within the city of *London*. There is no direct allegation of the custom of the city of *London*, either as to the custom of foreign attachment, or the proceeding by bill of proof; and the superior courts cannot judicially take notice of the custom of *London*, unless it be specially pleaded, or otherwise formally brought to their notice; *Banks* v. *Self* (*d*), *Bohun* (*e*), *Nonell* v. *Hullett* (*g*), *Theyer* v. *Eastwick.* (*h*) In *Bohun's Privilegia Londini* (*i*), a book of authority on this subject, it is said that, "by ancient custom, and by several charters, 1 char. *Ed.* 4. and 1 char. *Car.* 1., the customs of the city of *London* are to be certified by word of mouth, that is, by the mouth of the Recorder; as the custom touching apprentices, freemen, &c.; and he refers to the case of *Day* v. *Savage* in *Hobart's Reports.* (*k*) The custom of the city of *London* is not mentioned in that part of the plea which relates to the attachment, and the custom of foreign attachment cannot be inferred from the mere allegation that process of attachment was prayed according to the custom of the said Court; for all

(*a*) page 223. 4th edit.
(*b*) page 197., and see the cases referred to in p. 199.
(*c*) 3 *Atk.* 223.
(*d*) 5 *Taunt.* 234.
(*e*) *Privilegia Londini*, p. 284.
(*g*) 4 *B. & Ald.* 646.
(*h*) 4 *Burr.* 2032.
(*i*) page 64.
(*k*) *Hob.* 85.

1837.

BEHRENS v. PAULI.

all process, in every Court, must be granted according to the usual forms of the Court, and, in that sense, according to the custom of the Court. As to the particular custom of proceeding by way of bill of proof, it is extremely doubtful whether that custom has ever been certified by the mouth of the Recorder; and if it has not, the superior courts cannot judicially take notice of it. But there is another and a fatal objection to this plea: it is not alleged that the judgment in the Lord Mayor's court was a final judgment. Nor could it, in point of fact, be so alleged; for it was a mere judgment in the nature of a nonsuit, "that the Plaintiffs should go without a day;" and it is perfectly open to the Plaintiffs to commence another proceeding in the same court. In pleading a former suit, the defendant is bound to shew that it was *res judicata*, an absolute declaration of the court that the plaintiff had no title; *Brandlyn* v. *Ord.* (*a*) There must also be an express averment that the former writ was for the same matter: *Devie* v. *Lord Brownlow.* (*b*)

Another ground upon which this plea ought to be overruled is, that the Defendant has made no answer to that part of the bill in which he is charged with the knowledge of the insolvent circumstances of *Beel* and *Whittaur* before the institution of the proceedings in the Lord Mayor's court, and of the actual declaration of insolvency before the attachment was completed. The proceeding in the Lord Mayor's court being alleged to be fraudulent, and that charge being unanswered, a court of equity will not allow the matter in dispute to be determined by a tribunal, where the alleged fraud cannot be inquired into.

Mr.

(*a*) 1 *Atk.* 571. (*b*) 2 *Dick.* 611.

Mr. *Pemberton*, in reply.

1837.

BEHRENS v. PAULI.

The Plaintiffs have elected to make their claim in a court of competent jurisdiction, and they cannot, now that a verdict and judgment have been obtained against them, bring the same matter of litigation before another tribunal. The Plaintiffs, having been themselves active parties in the proceedings in the Lord Mayor's court, cannot be heard to object to the plea on the technical ground that it does not allege that there is such a court, or that it is in accordance with the custom of *London* to institute such proceedings. Still less is the Court called upon to overrule this plea on the ground that the custom of foreign attachments in the city of *London*, or the custom of proceeding by bill of proof has not been certified to it by the mouth of the Recorder. If the judgment is, in the Lord Mayor's court, conclusive, the Plaintiffs may appeal; and if it is not conclusive, it is open to them to resort to such further proceedings as the practice of that court may allow.

The MASTER *of the* ROLLS.

Feb. 15.

The plea for the purpose of the argument must be taken to be true, and, upon the bill and plea together, it appears that *Von Melle*, being a creditor of *Beel* and *Whittaur*, by his proceedings in the Lord Mayor's court sought to recover the 104*l.* 19*s.* in the hands of *Pauli* and *Jones;* that the Plaintiffs intervened, and, by proceedings of their own, claimed to be the owners of the same sum of 104*l.* 19*s.* which, they alleged, was due to them as assignees of *Beel* and *Whittaur*. In the result of these proceedings judgment was given against the Plaintiffs.

After this judgment obtained against them, they filed the present bill, in which, while they suppress all men-

1837.

BEHRENS v. PAULI.

tion of their proceedings in the Lord Mayor's court, they make precisely the same claim which they made in those proceedings, and on precisely the same grounds, the only additional circumstance alleged being, that *Von Melle* knew of the stoppage of payment when he commenced his proceedings, and of the insolvency soon after it was declared.

The plea is objected to on several grounds. It is argued that the custom of the city is not sufficiently alleged, either as to the attachment, or as to the bill of proof; that there is no averment, that either the garnishees or the goods were within the city, or that the judgment was final; and that there is no answer to the charge of notice.

If the Plaintiffs had been no parties to the proceedings in the Lord Mayor's court, and no mention had been made of those proceedings in the bill; and if the plea had been the defence of the garnishees, protecting themselves on the ground that payment had been recovered from them by due course of proceeding in the Lord Mayor's court, the objection to the want of sufficient allegation of the custom would have been important. But in this case, by taking the bill and the plea together, the objection is to a considerable extent removed; and, though I do not think that the custom of the city is accurately spoken of as the custom of the court, yet taking, as we must, the custom of the "said court" to mean the custom of the Lord Mayor's court of the city of *London*, I think that the inaccuracy cannot justly be considered as fatal to the plea. The Plaintiff and Defendant proceed to a certain extent together; and, under the circumstances, I do not think it necessary that the Defendant, in his plea, should allege the custom with the same particularity which might have been proper, if nothing about the

1837.

BEHRENS v. PAULI.

the custom had appeared otherwise than by the plea. If the custom as to the bill of proof be not correctly stated, or be incapable of being established, as was suggested, a replication which would put that question in course of trial may be filed. With respect to the next objection, the bill alleges that, by the custom, *Von Melle* may recover the sum in question: this he could not do, if the garnishees and the goods were not within the city; and, upon the frame of this record, it does not appear to me that an allegation in the plea that the garnishees and the goods are within the jurisdiction is necessary. And as to the judgment which, it is said, ought to have been alleged to be final, it is not in its nature interlocutory only; it is a judgment after verdict; it may be capable of being set aside in the court in which it is entered up, and, if so, the Plaintiffs may of course adopt the proper proceedings for that purpose; and I think that the charge of notice contained in the bill and unanswered does not leave the Defendant open to the imputation of fraud, or afford grounds for the interference of a court of equity with the proceedings in the Lord Mayor's court.

On the whole I consider it to appear, on the bill and plea, that the Lord Mayor's court is a court of competent jurisdiction to decide the question between these parties; and that the judgment, which has been obtained there, is a valid and subsisting judgment. The subject in dispute has been duly litigated, and, if not absolutely decided, is in a proper course for decision. And the Plaintiffs, having thought fit to produce, and endeavour to establish their claims in a court of competent jurisdiction, and now alleging no want of jurisdiction — no irregularity — no incompetency to do complete justice, are not now at liberty to change their tribunal.

Plea allowed.

1837.

Jan. 19.

MOUNTFORD *v.* COOPER.

A cause, upon the counsel for the Plaintiff undertaking to certify that it was proper to be heard as a short cause, was directed to be put into the next paper of short causes without the concurrence of the Defendant's solicitor.

Inexpediency of the rule requiring such concurrence, where it is withheld merely for the purpose of delaying the taking of accounts in the Master's office.

MR. *PEMBERTON* moved for leave to have this cause advanced for the purpose of taking a decree, which would be quite of course. The motion was opposed by the Defendants, the accounting parties, upon no ground, as he believed, except the desire of putting off the period of taking the accounts.

Mr. *Kindersley* said he was instructed to oppose the motion. The accounts were of a complicated nature, and the Defendants desired some further time before going into the Master's office.

The MASTER *of the* ROLLS inquired whether the counsel for the Plaintiff was ready to certify that this was a proper cause to be heard as a short cause; and Mr. *Pemberton* having replied in the affirmative,

His Lordship directed that, upon such certificate being made, the cause should be set down for the next day of short causes. Where a cause was proper to be heard as a short cause, and the Defendant or his solicitor opposed its being so heard merely for the purpose of putting off the day of accounting, great inconvenience to the suitor resulted from the rule which required the consent of the solicitor for the Defendant to the cause being set down to be heard as a short one; and his Lordship intimated that it might be expedient to lay down a general rule by which that inconvenience might be prevented.

1837.

REES *v.* EDWARDES.

Jan. 19.

MR. *COLERIDGE* applied for leave to amend the bill without prejudice to the injunction, the Master to whom the application had been made under the thirteenth and fourteenth sections (*a*) of the 3 & 4 *W.* 4. *c.* 94. having declined to hear it, on the ground that, as it was not an application for leave to amend in the terms of the act, but for that leave and something else, he had no jurisdiction.

Mr. *Rogers*, *contrà*, contended that this was clearly a special application for leave to amend, which, by the recent act, the Court had no jurisdiction to hear, except by way of appeal.

The MASTER *of the* ROLLS said that, as the Master had come to the conclusion that he had no jurisdiction, this Court must hear the circumstances; and when possessed

The 3 & 4 *W.* 4. *c.* 94. *s.* 13., giving jurisdiction to the Masters to hear and determine all applications for leave to amend bills, does not apply to cases where the party is entitled of course to leave to amend, as where leave is given at the hearing to amend by adding parties, or to cases where it is necessary for the Court to hear all the cumstances enabling it to determine whether leave ought to be given to amend, or not.

(*a*) The thirteenth section enacts, that the Masters in Ordinary of the High Court of Chancery shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, and for enlarging publication, and all such other matters relating to the conduct of suits in the said Court, as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice-Chancellor, or one of them, shall by any general order or orders direct, in such manner and under such rules and regulations, as by any general order or orders to be also issued by the Lord Chancellor with the advice and assistance aforesaid, shall be directed; and that it shall be lawful for either party to appeal by motion from the order ma on such application to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor; and that the order made on such appeal shall be final and conclusive.

And the fourteenth section enacts, that no such application as above mentioned shall in future be heard by any of the Judges of the said Court of Chancery, except on appeal as thereinbefore provided.

1837.

REES v. EDWARDES.

sessed of the circumstances, it would be for the Court to determine how the question was to be disposed of.

It appearing that the injunction, which was originally the common injunction, had been continued upon the merits on the coming in of the answer, and that the object of the motion was to amend such parts of the bill as were founded upon a mistake not affecting those merits,

His Lordship was of opinion that the Plaintiff was entitled to amend without prejudice to the injunction, upon payment of costs, and made an order to that effect. His Lordship observed that the 14th section of the recent act appeared to preclude the Judges of the Court of Chancery from all original jurisdiction in cases of application for leave to amend, but that strict construction had not been put upon the act. It had been held that the act did not apply to orders of course to amend the bill, nor to cases in which the Court, being possessed of all the circumstances of the case, was enabled at the time to exercise a proper discretion on the subject of amendment; thus, if it appeared at the hearing of a cause, or of a plea or demurrer, that the Plaintiff ought to have leave to amend by adding parties, leave had been accordingly given, and would be given for other purposes, if the justice of the case required it; for, if the Court had no jurisdiction in such cases, it would follow that after all the circumstances necessary for the determination of the question of amendment had been heard by the Court, the parties could not receive a decision from the Court, but must go to the Master to have the question decided by him, subject to an appeal to the same Court.

In the present case the Plaintiff required something more than an order to amend. That something more the Master could not give; and if the Court refused to hear

hear such a motion as this, the Plaintiff could only obtain that which he might be perfectly entitled to, by first applying to the Court for an order to the effect that, if on a future application to the Master he should obtain an order to amend his bill, such order to amend might be without prejudice to the injunction. An application of this sort would draw into consideration all the circumstances necessary for the determination of the question, whether the Plaintiff ought to have leave to amend or not. The Court could not properly decide upon it without forming an opinion, whether the Plaintiff ought to have leave to amend or not; and, after that, to send the parties to the Master for his decision, subject to appeal to the same judge whose opinion was already formed, would be highly and unnecessarily inconvenient.

WYNDHAM *v.* Lord ENNISMORE.

Feb. 23.

It appearing that an infant ward of the Court had been sent abroad in consequence of the advice of medical men that the infant's removal to a milder climate was necessary for his health, the Court granted a reference to approve of a plan for the infant's maintenance and education out of the jurisdiction, but limited the allowance to be made to one year.

A REFERENCE having been directed to the Master to inquire where and with whom the infant Plaintiff, *George Thomas Wrighte Wyndham*, was then residing, and, in case he should find that the infant was not residing with his mother, to state under what circumstances the infant had been removed from her care, the Master by his report stated, that it appeared by a statement in writing laid before him, and by the several affidavits mentioned in his report that the infant Plaintiff was, in the month of *January* 1836, residing with his mother the Defendant, Lady *Ennismore*, at *Convaymore* in the county of *Cork* in *Ireland;* that he had previously been, and and at that time was, seriously indisposed; that the medical advisers of the infant Plaintiff considered it absolutely necessary to his health that he should be forthwith removed to a milder climate; that Lady *Ennismore*, in her anxiety to comply with the

1837.

WYNDHAM v. Lord ENNISMORE.

the advice of such medical men, and believing in the absolute necessity of an immediate compliance therewith, caused the infant Plaintiff to be sent in the month of *January* 1836, under the care of a proper person as governess, to the Island of *Madeira;* and that, in so sending the infant Plaintiff abroad out of the jurisdiction of the Court, she was actuated solely by the desire to provide for his health, and was not aware that she was violating any of the rules or regulations of the Court.

A petition was now presented by the guardian of the infant Plaintiff, praying that the infant might be permitted to continue resident at *Madeira* or such other place abroad as might be approved of by his medical advisers, the Defendants (Lord and Lady *Ennismore*) giving, as they were willing to do, security to the Master for the return of the infant Plaintiff within the jurisdiction, when required; and that it might be referred to the Master to approve of a proper scheme for the future maintenance and education of the infant.

Mr. *Roupell*, in support of the petition.

The MASTER *of the* ROLLS made the order, observing that the mother of the infant had in this case done only what the Court, upon an application made to it, would have directed; but the allowance for the infant's maintenance and education must be limited to one year, with liberty to make further application to the Court, if necessary. (*a*)

(*a*) For orders made by the Court, where maintenance was to be allowed to infants out of the jurisdiction, see the case noticed by Mr. *Jacob* in *Lyons* v. *Blenkin* (*Jac.* 254. 264, 265.), the name of which case was *Jackson* v. *Hankey;* and *Stephens* v. *James* (1 *Mylne & Keen*, 627.).

1837.

GAYLER *v.* FITZJOHN.

Feb. 9, 10.

THE bill was filed by *William Gayler* on behalf of himself and all other the creditors of *Thomas Wells Fitzjohn* deceased, against *Robert Fitzjohn* the administrator of the deceased intestate. The decree directed the usual accounts of the intestate's estate, and gave no authority to the Master to state special circumstances.

At the hearing for further directions, it appeared that the Master had, by his general report, found the debt claimed by the Plaintiff, part of which was a sum secured by a promissory note, to be due to him; but he added to that finding the following statement: —

"A claim has been laid before me on behalf of the Defendant, *Robert Fitzjohn*, touching a sum of 150*l.* as having been paid to the Plaintiff *William Gayler* on account of his debt, as to which claim it is submitted to me that, inasmuch as the assets of the intestate will not be sufficient to pay his debts in full, the said sum of 150*l.* ought to be deducted out of the sum which may be apportioned to the Plaintiff in respect of his whole debt instead of being allowed to him in part payment of such whole debt, as stated in the first schedule to this report, and in support of such claim a receipt for the said sum of 150*l.* from the Plaintiff *William Gayler* to the Defendant *Robert Fitzjohn*, hath been produced before me, which is as follows: —

"Received

The Master is not at liberty to state special circumstances, unless authorised by the Court; and where in a creditor's suit the decree directed the usual accounts, and the Master found the amount of the debt appearing to be due to the Plaintiff, but stated, without the authority of the Court, special circumstances, not supported by evidence, raising a doubt as to the amount of the apportionment to which the Plaintiff would be entitled out of the intestate's estate, which was insolvent, upon the debt so found due, the Court refused to enter into the consideration of such special circumstances.

Semble, that the decision would have been the same, had the special circumstances been supported by evidence before the Master.

1837.

GAYLER v. FITZJOHN.

"Received *March* 4th 1822 of *Robert Fitzjohn* administrator, 150*l.* on account of my demand against the estate of the late *Thomas Wells Fitzjohn*, and I undertake to repay any sum of money paid to me above my due share out of the said estate."

'*W. Gayler*, his mark.'

"And I have thought fit to state the said last-mentioned claim at the request of the solicitor for the Defendant *Robert Fitzjohn*, in order that he may be enabled to obtain the direction of the Court touching the payment of the said sum of 150*l.* to the Plaintiff, in case the Court should be of opinion that the said sum of 150*l.* should go in diminution of such proportion of the assets of the intestate as the Plaintiff would have been entitled to receive in respect of his whole debt in case such sum had not been paid to him, or otherwise that he is entitled to a proportion of such assets, *pari passu*, with the other creditors upon the whole debt, as stated in the first schedule.

It did not appear that any evidence was gone into before the Master.

The intestate's estate was insolvent; and the question was whether, upon the special statement made by the Master, the apportionment to which the Plaintiff would be entitled upon the debt found due to him ought not to be reduced by reason of the alleged part payment and receipt given by the Plaintiff before the filing of the bill.

Mr. *Pemberton* and Mr. *Busk*, for the Plaintiff, insisted that the Master had no authority to state any circumstances specially, without the express direction of the Court; and that, unsupported as those circumstances

stances were by any evidence, the Court was bound to exclude them altogether from its consideration. There was nothing upon the face of the pleadings to support such a statement; the alleged receipt was, in the absence of all evidence, entitled to no attention whatever; and the doubt raised by the Master, as to the apportionment to which the Plaintiff was entitled upon the debt found due to him, was improperly introduced into the report.

Mr. *Kindersley* and Mr. *Webster*, *contrà*, said, that the transaction was well known to both parties, and that it was not denied by the Plaintiff that he had given the receipt produced before the Master, by which he undertook to repay whatever money he might receive beyond his share out of the intestate's estate. If the Plaintiff had received part payment of his original debt, which was not denied, he was not entitled to an apportionment upon the remainder on the same terms as the other creditors, and the point had been properly raised by the Master. In a case before Lord *Hardwicke*, it was said, that former decrees for an account contained a clause that, if there were any special matter, the Master might state it specially; but that decrees were then drawn up without this clause, and the Master might state special matter notwithstanding. *Anon.* (*a*) And in a more recent case, it was decided that the Master might, by his report, state the grounds of his decision with respect to any claim made before him, although the decree did not direct him to state any special matter. *Champernowne* v. *Scott.* (*b*)

Mr. *Pemberton*, in reply.

Champernowne v. *Scott* has no application to the present case. There the order of reference was a very special

(*a*) 2 *Atk.* 621. (*b*) 4 *Mad.* 209.

1837.

GAYLER v. FITZJOHN.

special one, the Master being required to take an account of all dealings and transactions between the Plaintiff and the Defendant, and to state what was due from either of the parties to the other of them; but, in case he should find any account settled, that he should not unravel the same, but that either of the parties should be at liberty to surcharge and falsify. The Master disallowed a claim, not upon the merits, but because it was of a nature that could not be properly investigated before the Master. Under those circumstances, it was absolutely necessary that the Master should state that he had not considered the validity of the claim, and for what reason.

The MASTER *of the* ROLLS.

The receipt is alleged to have been given in *March* 1822. In *January* 1827 the Plaintiff filed the bill, in which he seeks to be paid out of the assets of the intestate the amount of the debt due to him. The answer of the Defendant *Robert Fitzjohn* is wholly silent as to the alleged payment of the sum of 150*l.* and receipt given by the Plaintiff. The decree directed the Master to take an account of the debts, and did not authorize him to state any special circumstances. The Master by his report states, that, in taking the accounts, he finds a certain sum of money to be due to the Plaintiff; and he adds in his report certain special circumstances, as to which, whether they are founded in evidence or not I have no means of knowing. It is not alleged that any evidence was gone into before the Master; but it is said that the fact is well known to the parties, and that there is no denial of it. I cannot adjudicate in a case founded upon no evidence whatever; but the inclination of my opinion is that, even if the alleged circumstances were founded upon evidence, I have no authority to take notice of them, nearly five years having

1837.

GAYLER v. FITZJOHN.

having elapsed between the alleged transaction and the filing of the bill, no notice being taken of it in the answer, and no exception having been taken to the Master's report finding the debt due. The Master, where inquiries are directed to be made, is bound to follow out those inquiries, and to consider every thing which has a direct bearing upon them, and to state or refer to the evidence on which he has proceeded. But he is not at the request of the solicitor for one party to enter into other circumstances, and present a new case to the Court, unless he has a special authority, and it would, in ordinary cases, be contrary to the plain principles of justice, if he were allowed to do so. It would be unjust that parties, who come here in the fair expectation that a certain sum of money will be finally adjudicated to them, should have to encounter new matter in the Master's report, which they had no means of counteracting, and for which they were wholly unprepared by any thing in the state of the pleadings, or in the directions of the Court. Before the new orders were framed, it was a question much discussed, whether the Master should be at liberty, of his own authority, to state special circumstances, and it was not considered expedient that he should have such liberty; and according to the practice of the Court, I think myself bound to take no notice of the special circumstances stated by the Master of his own authority. I consider the Master's finding of the debt appearing to be due to the Plaintiff, as conclusive between the parties.

1837.

Feb. 22.

NEALE *v.* MACKENZIE.

Insolvency is a ground upon which the Court will refuse specific performance of an agreement to grant a lease, but there must be proof of general insolvency, and a particular default in the payment of rent to the landlord of the premises, last occupied by the person contracting for the lease, will not disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility.

A. having a life interest in premises vested in trustees who had a power of leasing, agreed to grant a lease for twenty-one years to *B.* The trustees refused to grant a lease to *B.*, on the ground that he was in insolvent circumstances, and that the grant of such lease would be a breach of trust against their *cestuis que trust.*

The Court being of opinion that *B.* was entitled to specific performance, and that the trustees had given *A.* some authority to act, ordered the trustees to execute a lease to *B.* to the extent of *A.*'s interest.

THE bill was filed by *Thomas Neale* against the Defendant *John Andrew Mackenzie*, and the Defendants *Archibald Corbett* and *John Carr;* and it prayed for the specific performance of an agreement by the Defendant *Mackenzie* to grant to the Plaintiff a lease of the premises in question, for seven, fourteen, or twenty-one years, at a rent of 65*l.*, and that the Defendant *Mackenzie* might procure all other (if any) necessary parties to execute such lease, and that he might make compensation to the Plaintiff in respect of the matters mentioned in the prayer.

The premises comprised in the agreement, consisting of a house with a garden and orchard at *Higham Hill* together with eight acres of land, were devised by *John Ingleby* to the Defendants *Corbett* and *Carr* as trustees in trust for his daughter *Ellen Ingleby*, and after her decease for her children; and the trustees were empowered, with the consent of the person or persons beneficially entitled in possession to the receipt of the rents and profits of the devised estates, to demise all or any part thereof to any person or persons for any term of years not exceeding twenty-one years, subject to the usual restrictions.

Shortly after the death of the testator, *Ellen Ingleby* intermarried with the Defendant *Mackenzie*, who, with the permission

1837.

NEALE v. MACKENZIE.

permission of the trustees, entered into possession of the devised premises. *Mackenzie* let the eight acres of meadow land to a tenant named *Charlton ;* and, being afterwards desirous of quitting the premises, he employed Mr. *Cooper*, a house-agent, for the purpose of procuring a tenant. Through Mr. *Cooper*'s agency the Plaintiff was introduced to the Defendant *Mackenzie*, and a memorandum of agreement, dated the 25th of *June* 1833, was signed by the Plaintiff and *Mackenzie*, whereby *Mackenzie* agreed to let to the Plaintiff the premises described as all that messuage, tenement, and premises, together with the garden, orchard, and meadow land thereto belonging, situate at *Higham Hill* in the parish of *Walthamstow*, for the term of one year from the date thereof, at the clear yearly sum or rent of 70*l.* to be paid in four equal quarterly payments on the usual quarter days. And the Plaintiff, on his part, agreed to take the premises at the aforesaid rent of 70*l.*, and to pay it in quarterly payments on the aforesaid quarterly days, or within a reasonable time thereafter. And the Plaintiff agreed to keep the grounds, orchard, and garden in a good and proper state of repair, and to pay all rates and taxes. And it was was further agreed by *Mackenzie* to grant, at the option of the Plaintiff, a lease of the aforesaid premises, orchard, and ground for the term of seven, fourteen, or twenty-one years, at the yearly sum or rent of 65*l.*, and which lease was to be subject to the usual covenants. And the Plaintiff, should he decline having a lease, agreed to give up peaceable and quiet possession of the premises at the expiration of the twelve months. By a further memorandum *Mackenzie* agreed to complete all the outward repairs then in progress, and the Plaintiff agreed to do the internal repairs. And possession was to be given to the Plaintiff at Midsummer.

In pursuance of the agreement, possession was delivered up by the Defendant *Mackenzie* to the Plaintiff

1837.

NEALE v. MACKENZIE.

of all the premises comprised in the agreement, except the eight acres of land which *Charlton* refused to deliver up on the ground that he had not received notice to quit from *Mackenzie*. The Plaintiff completed the internal repairs of the house, and expended money in doing other repairs upon the premises.

On the 25th of *December* 1833, *Mackenzie* demanded the entire half year's rent of 35*l*., which the Plaintiff refused to pay, as the possession of the eight acres of land had not been delivered up to him; and on the 3d of *February* following, *Mackenzie* levied a distress upon the Plaintiff's premises for 35*l*., being the whole amount of the half year's rent, which the Plaintiff paid under a protest. The Plaintiff brought an action against *Mackenzie* for the illegal distress, in which action he ultimately recovered damages.

On the 12th of *May* 1834, the Plaintiff gave notice to the Defendant *Mackenzie* of his intention to accept a lease in pursuance of the agreement; and in answer to that communication he received a letter from the solicitor of *Mackenzie* stating that the property belonged to the trustees of Mrs. *Mackenzie*, and that the Defendant *Mackenzie* had no power to grant a lease. In *October* 1834, the Plaintiff filed his bill, and upon the answer coming in, it appearing that the property was vested in the trustees *Corbett* and *Carr*, he amended his bill by making the trustees parties.

The Defendant, *Mackenzie*, by his answer, stated that in the month of *January* 1834, a Mr. *Curtis*, the father-in-law of the Plaintiff, resided with the Plaintiff on the premises; that in that month the name of Mr. *Curtis* appeared in the *Gazette* as a bankrupt, and that the Defendant, being apprehensive that the furniture on the premises would be seized by the assignees of Mr. *Curtis*, and

1837.

NEALE v. MACKENZIE.

and not adverting to the circumstance that possession of the eight acres had not been delivered up, distrained for the entire sum of 35*l.* That the Defendant had refused to grant a lease to the Plaintiff, because he had caused particular inquiries to be made concerning him, and had been informed and believed that he was a person of no responsibility, and had not the means of paying the rent agreed to be paid, and was in fact in insolvent circumstances; and, as evidence thereof, the Defendant said that, previously to the agreement, the Plaintiff occupied a house at *Shoreditch*, and that, soon after the execution of the agreement, the Plaintiff deserted the said house, and, in consequence of his inability to procure money for the purpose, left a year and a half's rent, amounting to the sum of 108*l.* and upwards, unpaid to the landlord.

The Defendant *Mackenzie* stated that the trustees, *Corbett* and *Carr*, previously to the agreement, had requested him to endeavour to find a tenant for the premises, but that they never assented to or confirmed the agreement. By his answer to the amended bill he said, that the part of his former answer stating that the two trustees had requested him to find a tenant for the premises was inaccurate, inasmuch as such request had only been made by *Carr*.

The trustees denied that they had authorised *Mackenzie* to let the premises or enter into any agreement; but *Carr* admitted that he had, in the course of conversation with *Mackenzie*, expressed a wish that the premises were let. They said that, from the information they had received respecting the Plaintiff, they considered that it would be an improper exercise of the power given to them by the testator to grant him a lease of the premises.

1837.

NEALE v. MACKENZIE.

The Plaintiff and Defendants went into evidence. On the part of the Plaintiff three witnesses were examined, one of whom had become surety for him to the amount of 1000*l.*, on his being appointed to the situation of collector of sewers for the district of *Bethnal Green*. They had all had dealings with him for many years, and considered him a person of credit and responsibility. On the other side, the landlord of the premises which the Plaintiff had last occupied proved that, when the Plaintiff quitted the premises, there was an arrear of a year and a quarter's rent; that the Plaintiff told him he was unable to pay; that the witness consented to take a composition of 60*l.* in a year and a half; that 10*l.* of that sum was paid by the Plaintiff's brother, and that the remaining 50*l.* remained unpaid. It was also proved that the Plaintiff had in the years 1822 and 1826 made compositions with his creditors, and that the collectors had much difficulty in obtaining from him the payment of taxes and poor-rates.

Mr. *Pemberton* and Mr. *Wilbraham*, for the Plaintiff.

It is obvious that the refusal of the Defendant *Mackenzie* to grant a lease to the Plaintiff arose out of the consequences of his own gross misconduct in distraining upon the Plaintiff for the entire rent, when he had himself failed to put the Plaintiff into possession of the whole premises comprised in the agreement, and that the alleged insolvency of the Plaintiff, upon which he rests his defence, is a mere after-thought and subterfuge by which he seeks to escape from the performance of the agreement. Even if it were true that the Plaintiff is now in embarrassed circumstances, the Defendant would not be permitted to refuse the performance of a contract merely because the contract with the Plaintiff was an indiscreet one. It is incumbent upon a man to make inquiries before he enters into a contract, and if the contract be fairly made, he cannot recede from it,

1837.

NEALE v. MACKENZIE.

it, merely because he afterwards discovers circumstances which may render it probable or even certain that he has made an injudicious agreement. But there is, in reality, no ground for the charge that the Plaintiff is incapable of paying a rent of 65*l.* a year. It is not pretended, even by the respectable witnesses who speak to the responsibility of the Plaintiff, that he is an opulent person; but they say, after having had dealings with him for many years, that he may be safely trusted in respect of any pecuniary engagements which he would enter into. He has been recently appointed to a responsible and profitable situation, and there can be no apprehension that his property would not be at all times sufficient to answer a distress for the amount of a quarter's rent. It is clear that the trustees, by their conduct, gave authority to *Mackenzie* to procure a tenant; they are, therefore, answerable for the acts of their agent, and consequently bound to grant a lease to the Plaintiff for the whole term. This is not like the case of a breach of trust committed by trustees against their *cestui que trust*, where the Court would not only not decree specific performance, but restrain the trustees from executing the contract (*a*). Even if the Court should be of opinion that the interests of the wife and children are not bound by the contract, the trustees are, at any rate, bound to grant a lease to the Plaintiff to the extent of Mr. *Mackenzie*'s interest in the devised premises.

Mr. *Kindersley* and Mr. *Loftus Wigram*, for the Defendant *Mackenzie*.

In distraining for the entire rent when the Plaintiff had not been put into possession of all the premises comprised in the agreement, the Defendant *Mackenzie*, no doubt, committed an act of inadvertence, and he has suffered

(*a*) *Mortlock* v. *Buller*, 10 *Ves.* 314.

1837.

NEALE
v.
MACKENZIE.

suffered for his inadvertence in the damages which have been given against him in a court of law. That part of the transaction is beside the question to be determined in this Court, which is simply, whether there is not such evidence of the Plaintiff's insolvent circumstances as to preclude the Court from interposing in his behalf by decreeing specific performance of the agreement, and compelling the Defendants to accept him for a tenant. It is proved that the Plaintiff has twice compounded with his creditors, first, in the year 1822, by paying 7*s.* in the pound; and a second time, in the year 1826, by paying 9*s.* in the pound. It is proved that he quitted the house which he last occupied, (the rent of which was 65*l.* per annum, being exactly the same which he was to pay by the agreement) leaving the rent, for one year and a quarter, unpaid for; and that his landlord afterwards consented to take a composition of 60*l.* for the whole sum due, 10*l.* of which only was paid by the Plaintiff's brother, the Plaintiff himself being unable, and acknowledging that he was unable to pay any part of it. Can it be fairly contended that a person proved to be in such circumstances is a person of such responsibility and solvency, that a court of equity ought to exercise its discretionary power of enforcing specific performance by compelling the Defendant, who has incautiously entered into an agreement with him, to accept him for a tenant? It is said that the rent is inconsiderable, and that the Plaintiff is at least a person of sufficient substance to have property to answer a distress for a quarter's rent; but is the payment of rent the only covenant which the lease would contain? and, if it were, would it be just or equitable that the Defendant should be compelled to grant a lease for twenty-one years to a person in such circumstances that the measure of his responsibility is admitted to amount to no more than the sufficiency of his furniture to answer a distress at each returning

1837.

NEALE v. MACKENZIE.

returning quarter? In *Buckland* v. *Hall* (*a*) Lord *Eldon* says that, as a lessee remains liable to the determination of the term, it is of great importance to the lessor to take care that the lessee shall be a man of substance, and that insolvency, therefore, is a weighty objection to a specific performance of an agreement for a lease. In that case the defendant had agreed to grant a new lease to the plaintiff, who was already in possession of the premises as assignee of a lease. The defendant refused to grant a new lease after the expiration of the plaintiff's term, and the plaintiff filed a bill for specific performance, and obtained an injunction to restrain the defendant from prosecuting an action of ejectment. Afterwards the plaintiff became insolvent and paid a composition of 9*s.* in the pound to his creditors, and Lord *Eldon*, upon that as well as other grounds, dissolved the injunction. So in a late case before the Court of Exchequer, where the plaintiff filed a bill for the specific performance of an agreement to renew a lease, the Court, being satisfied that the plaintiff was in insolvent circumstances, dismissed the bill, on the ground that the Court would not compel a landlord to take an insolvent person as his lessee: *Price* v. *Assheton* (*b*). It is clear that the trustees were not parties, or privy to this agreement, and that they would be guilty of a breach of trust, if they were to grant to a tenant, of whose want of responsibility they have notice, a lease which might compromise the interests of the wife in case of her surviving her husband, and of her children.

Mr. *Bayley*, for the trustees.

Mr. *Pemberton*, in reply.

The non-payment of a particular debt can no more be urged as evidence of a charge of general insolvency, than

(*a*) 8 *Ves.* 92. (*b*) 1 *Yo. & Coll.* 441.

1837.
NEALE v. MACKENZIE.

than the particular acts of a man's life can be legally given in evidence to prove his general character. If the Plaintiff had absconded from his last residence without communicating with his landlord, there might be some pretence for the charge of his having deserted the house without paying his rent; but he left the house with the knowledge of his landlord, and made a fair composition with him for the payment of the rent in a given time. The circumstances of the Plaintiff, at the time of his entering into the agreement, were greatly altered by his appointment to a lucrative situation, and by his retirement from business in which no man is exempt from risk, and in which the Plaintiff, it is admitted, has been unfortunate; and no inference as to his future ability to pay the rent of these premises can be fairly drawn from his previous embarrassments.

The MASTER *of the* ROLLS.

It appears that, under the will of *John Ingleby*, the father of Mrs. *Mackenzie*, the property in question was given to the Defendants *Corbett* and *Carr* as trustees in trust for Mrs. *Mackenzie* during her life, and, after her decease, in trust for her children. Mrs. *Mackenzie* married in the year 1832, and in consequence of that marriage Mr. *Mackenzie* became entitled, in right of his wife during their joint lives, to this property. If Mrs. *Mackenzie* survived her husband, she would be entitled, for her life; and if she died in his lifetime, the beneficial interest in the property would belong to her children. Mr. *Mackenzie*, being thus in possession of the property, let a portion of it to Mr. *Charlton* as tenant from year to year; and being desirous to procure a tenant for the rest he employed Mr. *Cooper*, an auctioneer, to let it. What were precisely the facts which took place at this time, it is difficult to collect from the statements made by the several parties. Mr. *Mackenzie* states, in his first answer, that both the trustees

trustees requested him to find a tenant; but, in his second answer, he says that this was a mistake, and that he was so requested by Mr. *Carr* only. In the answer of the trustees, *Carr* states that, in the course of conversation, *Mackenzie* mentioned that the premises were unoccupied, and that he (*Carr*) thereupon said he wished they were let. Whatever the real state of the case was as to this point, an agreement was entered into on the 25th of *June* 1833, between *Mackenzie* and the Plaintiff.

By that agreement *Neale* was to be tenant for a year at 70*l.*, and he was to have the option, at the expiration of that year, of taking a lease at seven, fourteen, or twenty-one years, at a rent of 65*l.* a year. Certain repairs were to be performed by these parties respectively; the internal repairs by the Plaintiff, and the external by *Mackenzie*. *Neale* was actually let into possession of all the property except the portion of land occupied by *Charlton*; and no complaint was made against him that he did not perform his part of the agreement. He continued in possession until the month of *February* 1834, when a warrant of distress was sent into his house, and not withdrawn till payment was received of the sum of 35*l.* which would have been the amount of rent due, had the Plaintiff been in possession of the whole of the premises. This conduct on the part of *Mackenzie* was naturally complained of, and an action was brought for the illegal distress, and damages recovered. This proceeding is no further material in the present case than as it marks the disposition which at this time existed between the parties.

In *May* 1834, *Neale* gave notice that he should call for a lease in pursuance of the agreement. In answer to that communication, he was told that *Mackenzie* had no right to grant a lease, inasmuch as the property was vested in trustees for Mrs. *Mackenzie*; and the consequence

1837.

NEALE v. MACKENZIE.

consequence was that this bill was filed. *Mackenzie* resists the specific performance of the agreement upon the ground I have mentioned, and also because the Plaintiff, as he alleges, is in insolvent circumstances; and he particularly alleges the fact of the Plaintiff having deserted the house which he rented of Mr. *Waddilove* without paying his rent. The bill having been amended to bring the trustees before the Court, a second answer was put in by *Mackenzie* in which he alleges other circumstances, with a view to shew the insolvency of the Plaintiff. It appears from the evidence that *Neale*, in the years 1822 and 1826, entered into compositions with his creditors, and that in the year 1833, about the time that he entered into this agreement, upon quitting the house which he then occupied in *Shoreditch* he prevailed upon his landlord to accept a composition of 60*l.*, for an arrear of rent, amounting to 81*l.* 5*s.* then due to him, and that of that sum of 60*l.* only 10*l.* has been actually paid. It appears also that the rates and taxes were not paid at the time he quitted the house, and that process was issued against him to compel payment.

These circumstances, it is said, afford such evidence of the insolvency of the Plaintiff, that the Court ought not to consider him entitled to compel specific performance of this agreement. I do not say that insolvency would not be a ground upon which the Court would refuse specific performance, but the insolvency must be proved in some satisfactory manner. It is not necessary that the party should be proved to have taken the benefit of the Insolvent Debtors' Act, or that he should have given up all his property for the benefit of his creditors; but there must be such proof of general insolvency as the Court can act upon, and as Judges upon great consideration have deemed

1837.

NEALE
v.
MACKENZIE.

deemed sufficient to indicate that state of circumstances; and there does not appear to me, in the present case, to be such evidence of general insolvency as can induce me to say that the Plaintiff is not in a situation to perform the covenants contained in this lease. On the other hand, there is the evidence of three persons of unimpeachable character, one of whom has been a surety for the Plaintiff to the amount of 1000*l.* since the year 1833, who speak to their having had dealings with him for many years, and to their opinion of his responsibility in terms which are entitled to the more weight, because they are not exaggerated. As to the compositions which he made with his creditors in the years 1822 and 1826, I do not think that I ought to advert to them. How can those circumstances be material, if he has conducted himself properly since that time? I think, therefore, that the Defendant *Mackenzie* is not entitled upon the alleged ground of the Plaintiff's insolvency to resist the specific performance of this agreement, and, as against him, the Plaintiff is entitled to the relief which he prays.

The next question is, whether the Plaintiff is entitled to relief as against the trustees, in respect of any other interest, except the interest of *Mackenzie*. It appears that the trustees left *Mackenzie* in possession of the property, and that they permitted him to let a portion of it to *Charlton*. They were aware, also, of some agreement entered into by *Mackenzie*; but I do not think the facts shew that they had any intention of trusting *Mackenzie* with the disposal of any interest beyond his own, or that they are bound by any part of the agreement that affects the interest of Mrs. *Mackenzie* if she should survive her husband, or the interest of the children after her death. The agreement, therefore, must be specifically performed so far as affects the interest

1837.

NEALE v. MACKENZIE.

terest of Mr. *Mackenzie*, and no further. The costs of the suit must be paid by the Defendant *Mackenzie*; those of the trustees by the Plaintiff in the first instance, and then over to him by the Defendant *Mackenzie*.

RADFORD *v.* RADFORD.

1836.
April 22.
May 6.

Devise of freehold and leasehold estate to *A.* and *B.* as tenants in common, and the heirs of the body and bodies of the said *A.* and *B.* as tenants in common, and if either of them should die without leaving issue, then as to the share of such of them as should so die without issue as aforesaid, to the use of the survivor of them, the said *A.* and *B.*, and the heirs of his body. And in case both of them should die without issue of his or their body or bodies, then to the use of *C.* for life, with remainder to the trustees to preserve, &c., and divers remainders over:

Held, that the limitation to the survivor was a good limitation by way of executory devise; that by the word "issue" in the succeeding clause, the testator intended such issue as were to take under the prior limitation, and that consequently the limitation over to *C.* was not too remote.

WILLIAM TUCKER, by his will, gave and devised all his messuages, lands, and hereditaments therein described (being partly freehold and partly leasehold), to *Peter Douglas Tucker* and *John Kingdon*, and their heirs, to the uses, upon the trusts, and for the several intents and purposes, and subject to the powers, provisoes, conditions, and limitations thereinafter expressed concerning the same, that is to say, to the use of *William Tucker Radford*, and *George Galway Radford*, sons of his late nephew *Peter Radford*, equally to be divided between them share and share alike, as tenants in common and not as joint-tenants, and the heirs of the body and bodies of the said *William Tucker Radford*, and *George Galway Radford*, lawfully to be begotten. And he thereby declared his will to be that, if either of them, the said *William Tucker Radford* and *George Galway Radford*, should die without leaving issue of his body lawfully begotten, then, as to the part or share of such of them as should so die without issue as aforesaid, to the use of the survivor of them the said *William Tucker Radford*, and *George*

1836.

RADFORD v. RADFORD.

George Galway Radford and the heirs of his body lawfully issuing, and in case both of them the said *William Tucker Radford* and *George Galway Radford* should happen to die without issue of his or their body or bodies, then to the use of his nephew *Arundel Radford* and his assigns, for and during the term of his natural life, with remainder to the same trustees to preserve contingent remainders, and divers remainders over.

The testator died on the 15th of *August* 1819, leaving the Plaintiffs *William Tucker Radford* and *George Galway Radford*, the devisees named in the will, surviving him.

The Plaintiffs, in the month of *December* 1835, entered into a contract with the Defendant *Benjamin Tucker Radford* for the sale of a part of the leasehold estates devised by the will; and the question was whether they could make a good title to the purchaser. That question depended upon the decision of two points; first, whether the limitation to the survivor of the Plaintiffs was or was not a valid limitation; and, secondly, whether, if that were a good limitation, the limitation over by way of executory devise to *Arundel Radford* was or was not too remote; and it was agreed between the parties to raise the question by way of demurrer for want of equity to the bill filed for specific performance by the vendors.

Mr. *Sharpe*, in support of the demurrer.

The testator first makes a devise to the Plaintiffs as tenants in common in words which, so far as the leaseholds are concerned, would, if the will went no farther, give them the absolute interest. Then follows the limitation by way of executory devise to the survivor of

1836.

RADFORD v. RADFORD.

of the Plaintiffs, and the heirs of his body, if either of them should die without leaving issue of his body, which is a valid limitation according to the settled rule that the word *leaving*, with reference to personal estate, restricts the sense of the word "issue" to issue living at the death: *Forth* v. *Chapman* (*a*), *Crooke* v. *De Vandes* (*b*). The next limitation is to *Arundel Radford*, in case both of the Plaintiffs shall die without issue of his or their body or bodies; and the question is, whether the word "issue" is here to be construed in a different sense from that in which the testator used it in the prior limitation. The intention of the testator must govern the construction to be put upon this clause in his will, and it can scarcely be successfully contended, that the testator meant to use the word issue in a restricted sense in one part of the sentence, and in an indefinite sense in the other. In *Sheppard* v. *Lexsingham* (*c*), it was held that the words "without issue" were to be construed "without leaving issue," in order to support a limitation over in manifest conformity with the intention of the testatrix, and Lord *Hardwicke* observed that in other parts of the will the testatrix used the words "leaving issue at the time of her death," and intended the same in the passage in question, but put it "leaving issue" only, for shortness. In the present case, the testator first uses the words "leaving issue;" then "issue as aforesaid," and lastly "issue," evidently employing the word "issue" in the same sense in every instance. The limitation over is made to *Arundel Radford* for his life; a circumstance which excludes all probability, that the testator contemplated an indefinite failure of issue. Even the words "failure of issue" have been held to mean failure of such issue as was intended

(*a*) 1 *P. Wms.* 663.
(*b*) 9 *Ves.* 197.
(*c*) *Ambl.* 122.

intended by a prior limitation where the intention of the testator required that construction: *Morse* v. *Lord Ormonde* (*a*). The use of the word "survivor" is another circumstance which has been held to favour the presumption that the testator had not in his contemplation an indefinite failure of issue: *Ranelagh* v. *Ranelagh* (*b*).

Mr. *Preston*, *contrà*.

This case is distinguishable from *Forth* v. *Chapman* (*c*), because here an express estate tail is given, in the first instance, to the Plaintiffs, whereas in *Forth* v. *Chapman* the limitation was to the testator's nephews, and if they should die and leave no issue of their respective bodies, then over. The limitation to the survivor of the Plaintiffs, in case either of them shall die without leaving issue, is not a valid limitation in respect of the leasehold estates, and the Plaintiffs, therefore, take absolute interests in those estates as tenants in common. The union of leasehold and freehold estates is an important circumstance in this case, and distinguishes it from cases in which the subject of devise is composed of freehold estate together with mere personal chattels. *Daintry* v. *Daintry* (*d*) is a case in point. There the testator devised to his son, and the heirs of his body all his real and personal estates, and if his son should happen to die without leaving issue of his body, then over; and the Court held that the son took an estate tail in the real estates, and a *quasi* estate tail in the leasehold estates, which would make his interest absolute. So in *Elton* v. *Eason* (*e*) where real and personal estates were given to *A.*, and the heirs of his body, if any, and in default

(*a*) 5 *Mad.* 99. and 1 *Russ.* 382.
(*b*) 2 *Mylne & Keen*, 441.
(*c*) 1 *P. Wms.* 663.
(*d*) 6 *T. R.* 307.
(*e*) 19 *Ves.* 73.

1836.

RADFORD v. RADFORD.

default of such issue over, it was held that the words, "if any," made no difference, and that the devisee took an estate tail in the real, and an absolute interest in the personal estate. The rule in *Forth* v. *Chapman* cannot be questioned, but it is not applicable to a case in which there is a previous gift of an estate tail in express words.

In *Lyon* v. *Mitchell* (*a*) where the testator gave the residue of his personal estate to his four sons in words which would have given them an estate tail, had it been real estate, and directed that, in case of the death of any of them without issue living at the time of their respective deaths, the share or shares of him or them so dying should go to the survivors and survivor, share and share alike, and to the issue of their several and respective bodies, Sir *Thomas Plumer* held that the bequests to the four sons passed absolute interests.

Even if the words, "without leaving issue," therefore, be admitted to mean "without issue living at the death," the Plaintiffs would, upon the authority of this case, be entitled to absolute interests. No argument can be drawn from the use of the word "survivor" which, in this case, is clearly used in the sense of *other*.

But, whatever construction may be put upon the limitation to the survivor of the Plaintiffs, the next limitation to *Arundel Radford* is plainly too remote, the word "issue" being used by the testator without any qualification, and admitting only of its natural and legal signification: *Barlow* v. *Salter* (*b*).

Mr.

(*a*) 1 *Mad.* 467. (*b*) 17 *Ves.* 479.

Mr. *Sharpe*, in reply.

The rule is settled that the devisee of a chattel real, under a bequest that would give him an estate tail in freehold property, with a limitation over in case he should die without leaving issue will take a defeasible interest, liable to go over, if the contingency happen. Lord *Kenyon*, indeed, in *Porter* v. *Bradley* (*a*) was disposed to question the rule in *Forth* v. *Chapman*; but Lord *Eldon*, speaking of Lord *Kenyon's dictum*, says that it went to shake settled rules to their very foundation: *Crooke* v. *De Vandes* (*b*). In the case of *Daintry* v. *Daintry*, which is relied upon on the other side, it is to be observed that, although by the certificate it is declared that, as to the leasehold interest, an absolute interest was vested in the devisee, Lord *Kenyon*'s observations upon the argument support the limitation over; for he says that "as to the personalty, he (the devisee) takes for life, and if he has children, he takes it absolutely; if he leave no children, then it will go over to the uncle by way of an executory devise."

The MASTER *of the* ROLLS held that the limitation to the survivor of the devisees in case either of them should die without leaving issue was, upon the authority of *Forth* v. *Chapman* which was fully established, a good limitation by way of executory devise; that, by the word "issue" in the succeeding clause, the testator intended such issue as were to take under the prior limitation over, and that, consequently, the limitation over was not too remote.

Demurrer allowed.

(*a*) 3 *T. R.* 143. (*b*) 9 *Ves.* 203.

1836.

Nov. 18, 19, 1837. *Jan.* 16.

The ATTORNEY-GENERAL v. The FISHMONGERS' Company.

Where it appeared upon an information against the Fishmongers' Company, that the Company had omitted to invest a legacy directed to be invested in land for the benefit of the charity, but had applied their own funds in aid of the charity to a larger amount than the investment would have produced; the Court held that the neglect to invest the legacy, either in land, or (if that could not be advantageously accomplished) in some separate fund, was a substantial ground of complaint, and directed accordingly such investment as appeared to be most beneficial to the charity, but refused any inquiry as to loss alleged, but not shewn to have been sustained by the neglect to invest. And, considering that the suit was not instituted for the benefit of the charity, the Court directed the Defendants to pay the costs as between party and party, and refused the relators their extra costs out of the charity fund.

THE information was filed by the Attorney-General at the relation of *Thomas Spencer Hull* and *George Smith* against The Fishmongers' Company, and it prayed a reference to the Master to inquire whether any investment had ever been made by the Company of the sums directed to be invested in land, for the benefit of poor almsmen of the company, by the will of *Jeremiah Copping*, and a declaration that the charity was entitled to the benefit of such investment, if any; and, if no investment had been made, then that the Company might account for the interest upon those sums at five per cent. from the year 1702, and that the Master might settle a scheme for the future regulation of the charity.

Jeremiah Copping, by his will, dated the 8th of *January* 1686, bequeathed as follows: I give, devise, and bequeath unto the Worshipful Company of Fishmongers, *London*, the sum of 1800*l.* in the hands of *Lyonell Copley*, Esq., the same to be laid out by the master and wardens of the said company in the buying and purchasing of lands for the maintenance of nine or ten poor old almsmen of the said company yearly for ever; and further to add to their said maintenance, I give and bequeath all that annuity or rent-charge of 50*l.* per annum and arrear thereof, payable to me and my heirs during the life of Sir *Anthony Brown*.

The

1836.

The Attorney-General *v.* The Fishmongers' Company.

The testator died soon after the date of his will, and about the year 1687, the Company received, in respect of the legacy of money stated to be in the hands of *Lyonell Copley*, the sum of 1632*l.* 17*s.* 3*d.*; and at various times between the years 1688 and 1702, they received several sums on account of the annuity payable during the life of Sir *Anthony Brown*, to the amount in the whole of 530*l.* 12*s.* 6*d.*

Long before the testator's will, the Fishmongers' Company were the Governors of *Jesus Hospital* at *Bray*, in *Berkshire*, founded for the relief of forty poor people, of whom six were to be chosen of the most aged and poorest decayed persons of the Company of Fishmongers, being freemen and freewomen of the Company of the age of fifty years at the least; and they were also trustees of certain almshouses at *Harrietsham*, in *Kent*, founded for the relief of twelve poor almsfolk, of whom six were to be of the poor free of the company of Fishmongers; and they were also governors of *St. Peter's Hospital*, at *Newington* in *Surrey*, which was founded for the relief of six poor men, free of the Company of Fishmongers. On the 14th of *May* 1688, an order was made at a court held by the master and wardens of the Company as follows:—"Upon consideration had of Mr. *Copping*'s will, and of the opinion of Mr. Serjt. *Pemberton* thereon, it is agreed and ordered by this court that, until a convenient purchase may be made of lands according to his will, the sum of 72*l.* yearly should be paid by the master of this court to the six almsfolk at *Bray*, and to the six almsfolk at *Harrietsham*, being free of the company, to wit 6*l.* a piece yearly, over and above the founder's allowance to them for their better maintenance; the first quarterly payment to be made at *Michaelmas* next, and the Company's

1836.

The Attorney-General *v.* The Fishmongers' Company.

voluntary allowance of 40*s.* yearly to cease at *Midsummer* next."

The sum of 72*l.* a year was, accordingly, regularly paid in pursuance of this order; and at various times between the years 1689 and 1710, the Company paid to almsfolk in the hospital of *St. Peter's Newington* sums of money amounting in the whole to 113*l.* out of the money received by them on account of the annuity of 50*l.* But the sum of 1632*l.* 17*s.* 3*d.* was not invested in land, pursuant to the directions of the will; and neither that sum, nor the 530*l.* 12*s.* 6*d.*, received on account of the annuity, was ever separately invested or secured in such a manner as to distinguish the same from other funds and monies in the hands of the Company; and no separate establishment was ever founded for the purpose of distinguishing the almsmen relieved by *Copping*'s legacy from other almsmen relieved by other gifts intrusted to the company.

Mr. *Temple* and Mr. *O. Anderdon*, in support of the information.

It is not denied by the answer, that no investment has ever been made of the sums directed by the testator to be invested in land for the benefit of the charity; but it is stated that, although no specific investment has been made of those particular sums, a much larger sum has been applied by the Defendants out of their own funds to the relief of the objects of the testator's bounty than could possibly have been produced by any investment of the specific sums bequeathed by the testator. The Defendants are called upon to account for the due discharge of the trusts reposed in them, and their answer is that, although they have neglected to fulfil the trust, they have more than compensated for their neglect by their

1836.

The ATTORNEY-GENERAL *v.* The FISHMONGERS' Company.

their extreme liberality. The same defence was attempted in the case of the *Attorney-General* v. *The Goldsmiths' Company* (*a*); but Sir *John Leach* held that their liberality would not avail the Company, that a breach of trust could not be repaired by a voluntary gift to the objects of the testator's bounty, and that the Company must account, therefore, for the money which had never been applied to the purposes of the trust in the manner directed by the testator.

In the present case, it is evident, from the language of the will, that the testator wished to found a charity of his own, and that the almsmen, who were the objects of his bounty, should be maintained out of funds appropriated and set apart for that purpose, and not out of the general funds of the Company. There might, at the time of the gift, be a temporary difficulty in procuring a beneficial investment in land, but the opinion of Serjeant, afterwards Chief Justice *Pemberton*, shews that he contemplated a future investment in land, and that no legal difficulty presented itself to his mind; for by the custom of *London*, expressly saved and preserved by Magna Charta, land might have been taken in mortmain by the company, 2 *Inst.* (*b*), *Lancelot* v. *Allen* (*c*), *Bohun Privilegia Londini: Norton's Historical Account of the City of London.* Had the money been invested in land in pursuance of the direction of the testator, the charity would have been benefited in proportion to the great increase which has taken place in the value of land; and the Company are bound, therefore, not only to invest the money, but to make good the loss which, upon inquiry, shall be found to have been occasioned by their neglect.

Mr.

(*a*) Rolls, *July* 1833.
(*b*) p. 20.
(*c*) *Cro. Car.* 248.

1836.

The Attorney-General *v.* The Fishmongers' Company.

Mr. *Pemberton* and Mr. *Romilly*, *contrà*.

The sum actually paid by the Company to the objects of the testator's bounty has, upon the average of the last four years, instead of 72*l.* a year, been 175*l.* a year: and it is for this flagrant violation of the trust reposed in them, that the two relators, unmoved by any consideration of the costs which they expect to derive from this suit, but stung with the strong sense of justice, and burning with zeal for the benefit of the charity, have dragged the Company into a court of justice to answer for their default. At present, the almsmen receive from the Company a much larger allowance than they are entitled to, and if the relators were to succeed in the pretended object of this information, the effect of their success would be to reduce that allowance to the extent of at least 30*l.* a year. *The Attorney-General* v. *The Goldsmiths' Company* is not applicable, because, although in that as in the present case the Company had distributed to the objects of the testator's bounty a much larger sum than they could have claimed, there had been no recognition of the particular legacy, and no express appropriation of any fund for the purposes of the legacy. Here, there has been a sum to the amount of 72*l.* a year set apart for the purposes of the will, until a purchase of land could be made, and in addition to the sum so set apart, the Company have paid to the almspeople sums which, together with the 72*l.* a year, greatly exceed the income which an investment in land could possibly have produced. What is said by Lord *Coke* in his commentary upon Magna Charta, with respect to the privilege of the citizens of *London* to take land in mortmain without a licence, is not supported by authority. The Company could not have invested the money in land without a licence, and that licence was probably not to be obtained except upon very unfavourable

1836.

The Attorney-General *v.* The Fishmongers' Company.

able terms. Supposing the Company to have committed an irregularity in not investing the money in land, if this bill has been filed without any intention to benefit the charity, and if, on the contrary, this suit must necessarily be injurious to the charity, the costs ought not to fall upon the Defendants, nor upon the fund. The principle laid down by Sir *John Leach* was that, where the subject of complaint, in an information against the trustees of a charity, was a mere technical irregularity, and that irregularity might have been corrected without a suit, if no previous application had been made to the trustees, he would, upon that ground alone, dismiss the information. In the late case of the *Attorney-General* v. *Cullum* (*a*), the Court did not dismiss the information, because it was necessary to make a decree in respect of some portion of the relief sought by it; but being of opinion that the main object of the information had failed, and that the information had not been brought with any view to the benefit of the charity, the Court refused to give the relators their costs. The same principle ought, it is submitted, to be applied to the present information, which can, in fact, produce nothing but mischief and injury to the charity.

Mr. *Temple* in reply.

The information has been filed under the sanction of the proper law officer of the Crown, who has in this case well exercised his discretion. It is not pretended that the sum of 530*l.* 12*s.* 6*d.* was in any way set apart to the purposes of the charity. The Company have mixed the whole of the money bequeathed by the testator with their own; they are, therefore, accountable for it, and the Court cannot refuse the relief sought by the inform-

(*a*) 1 *Keen*, 104.

1837.

The Attorney-General *v.* The Fishmongers' Company. *Jan.* 16.

information without overruling the *Attorney-General* v. *The Goldsmiths' Company.*

The Master *of the* Rolls.

It is alleged by this information, that the Company were bound to invest the whole sum of 2163*l.* 9*s.* 9*d.* in the purchase of land; that great loss has arisen by their neglect to do so, and that the amount of such loss ought to be ascertained by the Court, and made good by the Company; that a distinct establishment of the testator's charity ought to have been founded, and that the payments made by the Company for the relief of persons, whom they considered objects of the testator's bounty, have not exceeded 72*l.* a year, being much less than the interest payable on the charity money in their hands.

The Defendants on the other hand contend that, upon the true construction of the will, they were under no obligation to found a distinct establishment for the application of the testator's bounty; that they could not by law, without licence, invest the money received from the legacy in the purchase of land, and that although 72*l.* only has continued to be nominally paid on account of the testator's bequest, yet that they have annually paid out of their own funds, to or for the benefit of the same persons, large sums of money not only far exceeding the 72*l.* a year, but far exceeding the annual sum of money which could have arisen from any investment of the 2163*l.* 9*s.* 9*d.*

As to the alleged obligation of founding a distinct establishment, it is to be observed that in the will the

1837.

The ATTORNEY-GENERAL *v.* The FISHMONGERS' Company.

the testator has not directed any separate foundation. He has said nothing about alms-houses, or any name to be affixed to his charity, any scheme of selecting the persons among the freemen, who were to be the objects of his bounty, or to be distinguished as his alms-men; but he describes the persons who are to enjoy his bounty as "poor old almsmen of the Company," that is, already almsmen of the company, not as persons to be made so by the receipt of his bounty, and, upon the construction of his bequest, I cannot say that I think he meant to direct the foundation of a separate and distinct establishment, or to restrain the Company from applying the income to be derived from his gift for the maintenance of persons who were already almsmen of the Company in aid of funds previously applicable for their benefit; and therefore I cannot declare, as is asked by this information, that, according to the true intent and meaning of the will, there ought to be an establishment of almsmen of the foundation of the testator independent and distinct from all the other alms-people of the Company.

With respect to the investment, it appears to me that the Company ought within a reasonable time to to have invested the 1632*l.* 17*s.* 3*d.* in the purchase of land. They perhaps could not do so without a licence, to obtain which would have been an expense to the charity; but, by incurring the expense, the licence in all probability might have been obtained, and then the will might, in that respect, have been strictly performed. But supposing there to have been some insuperable difficulty about the investment in land, there ought clearly to have been a separate investment of some sort of both the 1632*l.* 17*s.* 3*d.* and the 530*l.* 12*s.* 6*d.* Those sums ought to have been distinguished from all other funds, so that it might at all times be ascertained,

1837.

The Attorney-General *v.* The Fishmongers' Company.

ascertained, if necessary, by a Court, and at all times easily proved by the Company, that the full income of the testator's gift was properly applied to the objects of his bounty, and I think it necessary that a distinct investment should now be made.

With respect to the allegation, that the Defendants have paid to the alms-people whom they have considered to be the objects of the testator's bounty less than they ought to be charged with for the interest of the money in their hands, I have carefully considered the evidence, and upon the result of it, I think the Defendants have satisfactorily proved that for many years past they have, for the benefit of these persons, annually applied out of their own funds far more than any sum of money with which they could be charged by way of interest, and there is no reason to presume that the case was different in times antecedent to those to which the evidence applies. Being of opinion, therefore, that proper objects of the testator's bounty have been substantially benefited by the Defendants as trustees to the full amount of the income to which they were entitled, I do not think fit to make any further inquiry in that respect; and, having regard to what the Company has done, and to what I conceive to be the real interest of the objects of the testator's bounty, I shall not direct an inquiry whether a proper investment ought to have been made, and whether any and what loss has been incurred by the neglect to make such investment at such time.

Under all the circumstances I think that all I ought to do, upon this information, is to direct the 2163*l.* 9*s.* 9*d.* to be invested. It is only the 1632*l.* 17*s.* 3*d.*, the sum arising from the 1800*l.* in the hands of *Lyonell Copley*, which is distinctly ordered to be invested in land, and it is

1837.

The Attorney-General v. The Fishmongers' Company.

is not quite clear that the sums received from the annuity were meant to be invested at all; but I think that it must now be considered as capital to be invested.

By obtaining a licence and pursuing the forms directed by the mortmain act, there might, even now, be an investment in land; but, considering the expence to be incurred and the disadvantage at which a purchase would probably be made in that mode, it does not appear to me that this would be beneficial to the objects of the charity. Looking at the words of the will, I cannot say that it ought not to be done, but I incline to think that the best course would be to bring the fund into Court, have it laid out in three per cent. annuities, and pay the dividends to the Company on the trusts of the will, with liberty to any party to apply respecting the investment.

I have very carefully considered this case with reference to the costs. The information, as to the greatest part of it, fails; as to that which succeeds, I do not think that it will substantially promote the benefit of the objects of the testator's bounty; and it appears to me to have been filed without any previous application to the Company. These and other circumstances have made me feel considerable hesitation in allowing the relators their costs.

But considering that the omission of the court to invest the legacy affords a substantial ground of complaint; that their meritorious application of their own funds for the benefit of the objects of this charity could not (in consequence of the omission to invest) be ascertained without the sort of investigation which this matter has undergone; and having regard, also, to the decree made by Sir *John Leach* in the case of the *Goldsmiths' Company*,

1837.

The Attorney-General v. The Fishmongers' Company.

Company, I think myself bound to say that the Defendants must pay the costs of this suit as between party and party.

At the same time I do not give to the relators what Sir *John Leach*, under the circumstances of that case, was induced to give, — the extra costs out of the charity fund.

March 3. 6.

TURNER *v.* EDGELL.

An exchange of lands, or an exchange of lands where a sum of money forms part of the consideration by way of equality of exchange, is not within the 1 *W.* 4. *c.* 60.

WILLIAM TURNER being seised, according to the custom of the manor of *Egham*, of certain copyhold land and premises forming part of that manor, entered into a contract with *Maria Frances Wyatt Edgell*, spinster, and *Louisa Elizabeth Wyatt Edgell*, spinster, whereby *Maria F. W. Edgell*, and *Louisa E. W. Edgell* agreed to convey to *William Turner* all the four freehold cottages and gardens with the plot of land and allotment, in the parish of *Egham*, therein described, in exchange for the copyhold land and hereditaments thereinafter agreed to be surrendered by *William Turner*; and *Maria F. W. Edgell*, and *Louisa E. W. Edgell* agreed to pay to *William Turner*, upon the execution of the agreement, the sum of 50*l.*, and upon the completion of the exchange to pay to *William Turner*, his executors, or administrators the further sum of 250*l.*; which sums of 50*l.* and 250*l.* it was thereby agreed should be accepted and taken by *William Turner*, his heirs, executors, and administrators, as and for the equality of exchange; and *William Turner* agreed to surrender to *Maria F. W. Edgell* and *Louisa E. W. Edgell*, their heirs and assigns,

or

1837.

TURNER v. EDGELL.

or as they or the survivor of them should direct, the fee-simple and inheritance of and in the copyhold land and hereditaments therein described, which land and premises were then in the occupation of *Maria F. W. Edgell*, and *Louisa E. W. Edgell*. And it was thereby agreed between the parties to the agreement, that they would respectively, on or before the 30th of *May* then next, make out and deliver to the other or others of them, or their respective agent, an abstract of their respective titles to the premises so agreed to be exchanged; and on the 24th of *June* then next, make out a good title and do all necessary acts for carrying the exchange into effect.

On the 30th of *April*, *Maria F. W. Edgell* and *Louisa E. W. Edgell*, in part performance of the agreement, paid to *William Turner* the sum of 50*l.*, as stipulated by the agreement.

On the 7th of *August* 1836, before the contract was completed, *William Turner* died intestate; leaving *Carey Turner*, an infant, his only child and heir-at-law, and the Plaintiff, *Elizabeth Turner*, his widow, surviving him.

The Plaintiff obtained letters of administration to her deceased husband's estate. A doubt having arisen whether the agreement could be carried into effect by reason of Mr. *Turner* having died before its completion leaving an infant heir, that doubt depending upon the question, whether the infant was a trustee within the meaning of the 1 *W.* 4. *c.* 60., the present suit for specific performance of the agreement was instituted by the Plaintiff against the Defendants, *Maria F. W. Edgell*, *Louisa E. W. Edgell* and a party to whom their interest had been assigned, and the infant heir, for the purpose of obtaining the opinion of the Court on that point.

Mr.

1837.

TURNER v. EDGELL.

Mr. *Addis*, for the Plaintiff, said that the doubt which had arisen upon this point was founded upon the supposition that the sixteenth section of the act applied to vendors only, no reference being made in terms to cases of exchange. Even if that objection were well founded, it would not apply to the present case, for this was not a case of mere exchange, the consideration consisting partly of land, and partly of 300*l.* in money, of which 50*l.* had been actually paid in money. So far as the consideration for the exchange consisted of money, it was a transaction between vendor and purchaser. But supposing the case not to fall within the sixteenth section, all doubt was removed by the eighteenth section, which extends the provisions of the act to every case of implied or constructive trust other than the cases provided for by the sixteenth section.

Mr. *Romilly*, for the Defendants, parties to the contract, and their assignee, submitted that the money agreed to be paid for equality of exchange did not alter the character of the transaction, which was an exchange, and not a sale. The question was, therefore, whether exchanges were within the meaning of the act. No provision was made for exchanges by the sixteenth section which applied only to cases of sale; but it was said that exchanges must be comprehended under the eighteenth section, which enacted that the several provisions thereinbefore contained should extend to every other case of a constructive trust, or trust arising or resulting by implication of law. The same eighteenth section, however, concluded by declaring that the act should not extend to cases of partition or election, or to a vendor, except in any case thereinbefore expressly provided for. From the exclusion of cases of partition and election, where the consideration of the transaction was not money, it might be reasonably inferred, that the

1837.

TURNER v. EDGELL.

the act was not intended to apply to such a case as an exchange; and as to the argument that the consideration for this particular transaction was partly money and partly land, and that, therefore, Mr. *Turner* might to a certain extent be considered as a vendor, such a case of a vendor is no where provided for by the act, and is consequently expressly excluded by the eighteenth section.

Mr. *Addis* in reply.

The eighteenth section enlarges the operation of the act to every case of constructive trust, or trust arising or resulting by implication of law, and by specially excepting cases of partition and election, it leaves cases of exchange untouched, and consequently included within the enlarging operation of the previous part of the section.

The MASTER *of the* ROLLS said, the inclination of his opinion was, that an exchange of lands, or an exchange of lands where a sum of money might also form part of the consideration by way of equality of exchange was not provided for either by the sixteenth or eighteenth section of the act, and on a subsequent day, his Lordship expressed his adherence to that opinion. *March* 6th.

1837.

March 1. The ATTORNEY-GENERAL *v.* The GROCERS' Company.

Where the case charged in an information, praying for the regulation of a charity, was inconsistent with the true state of the case set forth in the answer, and the relator brought the information to a hearing without amendment, and with a prayer for relief, founded on the untrue statement, no application having been made to the Company, trustees of the charity, for the correction of the alleged abuse previously to the filing of the bill, the Court, although it was a case in which some relief might have been granted, if it had been properly brought before the Court, dismissed the information with costs.

THE information stated, that *William Robinson*, by his will dated the 14th of *July* 1633, gave and bequeathed to the Master, wardens, and commonalty of the Mystery of Grocers, the sum of 400*l.* upon trust to disburse the name in the purchase of houses in and about the city of *London*, or other lands and tenements elsewhere at their discretion, the rents and profits thereof to be employed as follows, — that is to say, 16*l.* thereof to be yearly given and bestowed towards the maintenance of a schoolmaster to teach *English* and the *Latin* tongue in the parish of *Topcliffe* in the county of *York*, and the residue of the rents and profits to be given among poor and decayed men free of the said Company yearly for ever.

The bill alleged that the Company accepted the bequest, and invested the sum of 400*l.*, or part thereof in the purchase of property producing an annual income of much larger amount than the sum of 16*l.*; that they had from time to time paid, and did then pay, to a schoolmaster in the parish of *Topcliffe*, the sum of 16*l.*, but that they had not made any annual or other payment to any poor or decayed freemen of the Company in pursuance of the trusts of the will; but that, after paying the said annual sum of 16*l.*, they had applied the whole proceeds of the said sum of 400*l.*, and the accumulations thereof to their own use.

The information charged that the said sum of 400*l.* had been laid out many years since by the Defendants in

in the purchase of lands, which had been duly conveyed to the Company, and were then vested in the Company, subject to the trusts of the will; and that the Defendants had ever since been, and were then in possession of such lands, and in the receipt of the rents and profits thereof to a large amount.

The information further charged that the Company had invested the surplus of the rents and profits beyond the sum of 16*l.* in the public funds, and in other securities; and that, if the Company had not duly invested the said sum of 400*l.*, or the surplus proceeds thereof, they ought to be charged with compound interest at 5 per cent. on the sums so neglected to be invested. And it prayed an account of the rents and profits of the estates in which the estates were invested, and of the investments made, and accumulations received by the Defendants; a reference, if necessary, to settle a scheme for the regulation of the charity; and that all such further accounts might be taken, and directions given, as the case might require.

The Defendants, by their answer, admitted the bequest, and that the Company accepted the trusts thereof; but they said that the Company did not invest the said sum of 400*l.* in the purchase of any property, producing an annual income; that such sum remained in the hands of or due from the Company; that from the year 1651, they had paid, and continued to pay, the sum of 16*l.* to a schoolmaster in the parish of *Topcliffe*, which payment was made out of the rents and profits of the estates belonging to the Company and their general income. The answer went on to state that, by reason of the fire of *London* in 1666, and the consequent destruction of a great part of the property of the Company, the affairs of the Company became embarrassed

1837.

The Attorney-General *v.* The Grocers' Company.

and upon an inquisition taken under a Commission of charitable uses, in the years 1686, the Commissioners made a decree, by which the estates of the Company were ordered to be vested in trustees upon trust to apply the rents and profits to the payment of the growing charitable uses charged upon such estates, and, if there were any overplus of the annual rents, to apply the same in payment of the arrears of such charitable uses, and after the arrears should be satisfied, to pay the overplus to the Company, to be disposed of according to the will of the donors to members of the Company, and after all such charities should be fulfilled, to pay the residue to the Company to their own use. The Defendants further said that the Company many years ago resumed the management of their estates, and the administration of the said charities; that the Company had regulated themselves by the finding of the inquisition, and they submitted that by the effect of the decree of the Commissioners the sum of 400*l.* bequeathed by *William Robinson* (which was mentioned among other bequests in the decree) was charged upon the estates of the Company.

The Defendants further stated by their answer that in the year 1821, the Commissioners, appointed to inquire into charities, inquired into and reported upon the state of the charities under the management of the Defendants; that it was proved to their satisfaction that the annual revenues of the estates of the Company greatly exceeded the amount of the sums annually payable in respect of the several charities; and each charity being, by the operation of the decree, secured, not merely on the property originally given for its maintenance, but on all the estates of the Company, the Commissioners did not think it necessary to enter into any detail of the present condition of the premises originally

1837.

The Attorney General v. The Grocers' Company.

originally appropriated to each; that the report of the Commissioners was printed in the year 1822, and contained a statement of the proceedings connected with the inquisition, and of the bequest of *W. Robinson* from which the relators might have ascertained that many of the allegations of the information were without foundation.

The Defendants admitted that they had not made any payment in respect of the bequest in question specifically; but they said that they had, out of their general funds, expended yearly very large sums in charity for the benefit of poor members of the Company and for other charitable purposes.

Mr. *Billingsley Parry*, in support of the information, said that as it appeared, by the answer of the Defendants, that the legacy of 400*l.* had never been invested in pursuance of the trusts of the will, the decree of the Commissioners of charitable uses in 1686 could not exonerate the Company from their liability to answer for that breach of trust; that the whole amount of the legacy had been mixed with the funds of the Company, and, though a payment of 16*l.* a year appeared to have been made to a schoolmaster at *Topcliffe*, no attempt had been made to account for the application of the surplus produce of the 400*l.* and the accumulations. Under these circumstances he submitted that the relief sought by the information ought to be granted.

Mr. *Pemberton* and Mr. *Girdlestone*, *contrà*.

The question is, whether any case is made by this information, which calls upon this Court to interpose in the management of the charity. The information was in the first instance filed by two relators, who were as-

1837.

The Attorney-General v. The Grocers' Company.

certained to be persons of no substance; and, though the relator now substituted is a responsible person, he is not a freeman of the Company, and has no interest whatever in the objects of the charity. The charges in the information are completely displaced by the answer; there never has been any investment of the legacy in land, as is alleged in the information, and consequently there are no estates purchased with the legacy of which any account can be taken; and there can have been no misapplication, as is alleged, of the rents and profits of such supposed estates. The 16*l.* a year has been regularly paid to the schoolmaster; and that sum was charged upon the estates of the Company by the decree made in 1686 by the Commissioners of charitable uses, whose decrees are as valid and binding as the decrees of this Court. Under the sanction of that decree the Company has continued to pay the schoolmaster, and, as to any surplus in respect of the legacy, that might remain after payment of the 16*l.* a year, the sums paid annually by the Company out of their own funds to poor persons free of the Company greatly exceed the amount of any sums which they would derive from the specific application of any sums given for their benefit. No application was made to the Company, previously to the filing of the bill, with a view to the correction of the alleged abuse, for which there appears to be no foundation. It is submitted, therefore, that, in conformity with the rule laid down by Sir *John Leach* under the like circumstances, the Court ought to dismiss this information with costs.

Mr. *Billingsley Parry*, in reply.

Supposing the decree of the Commissioners in 1686 to be binding upon the Company, it does not appear that the Company have, in compliance with that decree, charged

charged their estates to the extent of the 400*l.* The surplus, beyond the 16*l.* a year to the schoolmaster, is not accounted for, even upon that supposition; but this Court is not bound by the decree of the Commissioners, and will see that the charitable trust is well executed, and the fund secured in the manner directed by the testator.

The Master *of the* Rolls (after stating the facts):—

The report of the Commissioners for inquiring into charities, printed in 1822, states the circumstances connected with the inquisition, and the decree made in 1686. It is not proved that the relators had read that report previously to the filing of this information, but it is difficult to avoid forming a suspicion that they were acquainted with its contents. Whatever knowledge the relators possessed at the time when the information was filed, it is certain that they have stated a case which is wholly inconsistent with the facts which really existed. They charge that the Company invested the legacy of 400*l.* in lands, and misapplied the proceeds of that investment, and the prayer is in accordance with that statement, "for an account of the sum of 400*l.*, and of the lands, tenements, and hereditaments purchased therewith, and all investments made thereof, and of all accumulations arisen therefrom, and of the rents, issues, profits, and annual proceeds of such estates, and investments and accumulations." The true state of the case is set forth in the answer, and, whatever the relators knew at the time of filing the information, they did obtain a knowledge of the truth from the answer. But instead of amending their bill, and putting their case in a shape which might have entitled them to obtain relief, they persevere in the untrue statement originally put upon the record, and ask for relief, not according to the

1837.

The Attorney-General *v.* The Grocers' Company.

true state of facts set forth in the answer, but according to the untrue statement made in the information. Looking to the decree made by the Commissioners of charitable uses in 1686, I am not satisfied that that decree is in all respects correct; and that it would not be for the interest of the charity, if a proper case were made, to inquire whether some alterations of the regulations then made might not be useful or necessary. But I cannot direct such an inquiry upon an information framed as this is, containing allegations which are not only not proved, but which the relator must know to be untrue, and praying for relief founded upon the untrue statement, and applicable only, if that statement had been proved to be true. I consider it, also, a very material circumstance, that no application was made to the Company for the correction of the alleged abuse before this information was filed; and, although this is a case in which some relief might have been granted, if it had been properly brought before the Court, I have no hesitation in dismissing this information with costs.

1836.

The ATTORNEY-GENERAL *v.* ASPINALL.

1836.
May 25. 27. 30.
July 4.

Demurrer allowed to an information filed for the purpose of setting aside a mortgage, and appropriation of the money thereby raised to the endowment of the clergy of *Liverpool*, made by the old council of the town of *Liverpool*, in the interval between the passing of the Municipal Corporation Act and the election of the new council, there being no allegation in the information of fraud, collusion, or improvidence, the new council having refused to take any proceedings for the purpose of calling in question the acts of their predecessors, and the application of the property for the more secure endowment of the members of the Established Church, not appearing to the Court to be other than an application which, under the circumstances, must legally be considered as beneficial to the inhabitants of the borough.

THIS was a supplemental information, filed by the Attorney-General at the relation of *Thomas Bolton* and *Timothy Jevons* against *James Aspinall* and other persons, as trustees holding the fund in question, against the mayor, aldermen and burgesses of *Liverpool*, and also against the Rev. *Jonathan Brooks* and several other clergymen of *Liverpool*; and it prayed that it might be declared that an appropriation of 105,000*l.* out of the property of the corporation of *Liverpool* for the permanent endowment of the clergy of the borough was unlawful and invalid, and that the Defendants, *James Aspinall* and others the trustees, might repay that sum to the Defendants, the mayor, aldermen, and burgesses of *Liverpool*, in order that the annual income thereof might be paid to the treasurer of the borough, to be by him carried to the account of the borough fund, and applied to the purposes to which the borough fund was applicable.

To this information, *James Aspinall*, and the other persons charged to be trustees, and the Rev. *Jonathan Brooks* and the other clergymen, put in a general demurrer for want of equity.

The case stated in the original, and in part recapitulated in the supplemental information, was in substance as follows: —

On

1836.

The Attorney-General v. Aspinall.

On the 5th of *June*, 1835 (the day on which the bill, which afterwards became the act for the regulation of Municipal Corporations, was introduced into parliament), the corporation of *Liverpool*, then governed by forty-one persons, called the common council of the mayor, bailiffs, and burgesses, was seised and possessed of considerable property, and indebted to divers persons to a considerable amount. The corporation were at the same time patrons of various churches in *Liverpool*; and provisions were made for the payment of the clergy to the amount of 1080*l.* a year out of pew rents, the funds of the corporation, and parish rates made under the authority of acts of parliament; to the further amount of 1040*l.* a year out of the parish rates by annual vote gratuitously made by the parishioners in vestry assembled; and to the further amount of 2515*l.* a year out of the corporate funds, by annual payments gratuitously made by the corporation.

In this state of circumstances the act of the 5 & 6 *W.* 4. *c.* 76., intituled, "An act to provide for the Regulation of Municipal Corporations in *England* and *Wales*" became a law. By that act provisions were made for a change in the governing body of the corporation, and in the application of the income of the corporate funds, and it was among other provisions enacted (*a*), that after the election of the treasurer in any borough, the income and annual produce of all the property of any body corporate, named in conjunction with such borough in schedules A. and B., should be paid to the treasurer of such borough; and that all the monies, which he should so receive, should be carried by him to the account of a fund to be called "The Borough Fund;" and that such fund, subject to such payments,

(*a*) *s.* 92.

1836.

The Attorney-General v. Aspinall.

payments, and, saving such rights and claims as are particularly mentioned in the act, should be applied to the payment of the salaries of the mayor and other officers in the act mentioned; and also towards the payment of divers expenses therein mentioned, connected with the municipal regulations to be made by virtue of the act, and with the police and administration of justice in such borough, and of all other expenses not therein otherwise provided for, which should be necessarily incurred in carrying into effect the provisions of the act; and that in case the said borough fund should be more than sufficient for the purposes to which the same was by the act made applicable, the surplus thereof should be applied, under the direction of the council, to the public benefit of the inhabitants and the improvement of the borough; and in case the borough fund should not be sufficient for those purposes, the council of such borough was thereby authorised and required from time to time to order a borough rate in the nature of a county rate, to be made within the borough, for the purpose of raising so much money as in addition to such fund would be sufficient for the payment of the expenses to be incurred, in carrying into effect the provisions of the act. And it was further provided by the act (*a*) that in every case in which any body corporate, or any particular class, number, or description of members, or the governing body of any body corporate, then was, in their corporate capacity, and not as charitable trustees, seised, or possessed of any advowson, or right of nomination, or presentation to any benefice or ecclesiastical preferment, every such advowson, and every such right of nomination and presentation should be sold at such time and in such manner as the Commissioners appointed by

(*a*) *s.* 139.

1836.

The Attorney-General v. Aspinall.

by his Majesty to consider the state of the established church in *England* and *Wales* might direct; and that the proceeds of every such sale should be paid to the treasurer of the borough, and be by him invested in government securities for the use of the body corporate, and that the annual interest payable thereon should be carried to the account of the borough fund. (*a*)

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(*a*) The 94th and 97th sections, upon the construction of which, as well as of the 92d and 139th sections, the questions raised upon this demurrer mainly depended, are (as to the material parts) as follows: —

By sect. 94. it is enacted, that it shall not be lawful for the council of any body corporate to be elected under the act to sell, mortgage, or alienate the lands, tenements, or hereditaments of the said body corporate or any part thereof, except in pursuance of some covenant, contract, or agreement *bonâ fide* made or entered into on or before the 5th day of *June* in this present year, by or on behalf of the body corporate of any borough, or of some resolution duly entered in the corporation books of such body corporate, on or before the said 5th day of *June*, or to demise or lease, except in pursuance of some covenant, contract, or agreement *bonâ fide* made or entered into on or before the said 5th day of *June*, by or on the behalf of such body corporate, or in pursuance of some resolutions duly entered in the corporation books of such body corporate, on or before the said 5th day of *June*, or except in the cases hereinafter mentioned, any lands, tenements, or hereditaments of such body corporate, or any part thereof; or to enter into any new covenant, contract, or agreement (except in the cases hereinafter mentioned), for demising or leasing any such lands, tenements, or hereditaments, or any part thereof, for any term exceeding thirty-one years from the time when such lease shall be made, or if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into; and in every lease, &c. Provided nevertheless, that in every case in which such council shall deem it expedient to sell and alienate, or to demise and lease for a longer term than thirty-one years, or upon different terms and conditions than those hereinbefore mentioned, any of the said lands, tenements, and hereditaments, it shall be lawful for such council to represent the circumstances of the case to the Lords Commissioners of his Majesty's Treasury; and it shall be lawful for such council, with the appro-

The original information, after stating that, pursuant to the last-mentioned provisions of the act, all such patronage or right of presentation as the corporation of *Liverpool*

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approbation of the said Lords Commissioners, or any three of them, to sell, alienate, and demise any of the lands, tenements, and hereditaments of the said body corporate, in such manner and on such terms and conditions as shall have been approved by the said Lords Commissioners, &c.

By sect. 97. it is enacted, that it shall be lawful for the council first to be elected in any borough under the provisions of this act, to call in question all purchases, sales, leases, and demises not made in pursuance of some such *bonâ fide* covenant, contract, agreement, or resolution, made or entered into as aforesaid before the said 5th day of *June*, and all contracts for the purchase, sale, lease, or demise of any lands, tenements, and hereditaments, and all divisions and appropriations of the monies, goods, and valuable securities, or any part of the real or personal estate of which, on or before the 5th of *June* in this present year, the body corporate of which they are the council, whether in their own right or as trustees for charitable or other purposes, was seised or possessed, which shall have been made or contracted between the said 5th day of *June* and the day of the declaration of their election; and for that purpose, if it shall appear to the said council that there is ground for believing that any such purchase, sale, lease, or demise, or such contract, or such division or appropriation of the premises, was collusively made for no consideration, or for an inadequate consideration, it shall be lawful for the council of such borough, at any time within six calendar months next after the first election of councillors under this act shall have been declared in such borough, upon notice of their intention being first given in the *London Gazette*, and also affixed on the outer door of the town hall, or in some public place within the borough, to cause the value of the lands in question to be inquired of and found by a jury of twelve indifferent men of the county in which, or adjoining to which, in the case of *Berwick-upon-Tweed*, and of all counties of cities and towns corporate, such lands, &c. do lie; and in order thereto the said council is empowered to summon and call before such jury all persons having the custody and possession of any deed or agreement concerning the said lands, &c., made or entered into since the said 5th day of *June*, and to cause all such deeds and agreements to be produced before the said jury and examined

1836.

The ATTORNEY-GENERAL *v.* ASPINALL.

Liverpool was entitled to, would require to be sold, and that the corporation was entitled to hold the same only until the sale thereof should be directed by the Commissioners,

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amined by them, and to examine upon oath every person who shall be thought necessary to be examined, and the council shall, by ordering a view or otherwise, use all lawful means for the information, as well of themselves as of the said jury, and the jury shall find the value of the said lands, &c., and the consideration which shall have been given for the purchase, sale, lease, demise, or appropriation thereof, according to the terms of such purchase, sale, lease, demise, contract, or appropriation, and, taking into account all the circumstances under which the same shall have taken place, and if the jury, by their oaths, shall find that no consideration, or a consideration less than that which they shall have so found to be the value which ought therefore to have been given, shall have been collusively given or contracted to be given by the terms of any such purchase, sale, lease, demise, contract, or appropriation, the party to such purchase, sale, &c. shall have his option to reconvey and restore the lands in question, and to abandon the contract to which he shall have been a party, upon receipt, in each case, of the consideration, if any, which he shall have given for the same, or to give therefore, in each case, such additional consideration, so that the whole consideration given shall be that which ought of right to have been given so found by the jury as aforesaid, and in every such case as last aforesaid, the additional consideration given or to be given shall be indorsed on the original deed or conveyance, and unless he shall so do within one calendar month next after the finding of the jury, every such purchase, sale, lease, demise, contract, and conveyance shall be absolutely void and of none effect as against the said body corporate and their successors, and in every case in which any such contract shall have been abandoned as aforesaid, or in which any such purchase, sale, lease, demise, contract or conveyance shall become void and of none effect under the provisions of this act, the party who would otherwise have had the benefit of the same shall be remitted to his former estate, title, and interest (if any) in the premises, as if no such contract purchase, sale, lease, or demise had been made or entered into. (Powers are then given for swearing such juries and provisions made for costs.) Provided nevertheless, that it shall be lawful for his Majesty, if he shall think fit, by the advice of his privy council, upon petition to him setting forth the special circum-

1836.

The ATTORNEY-GENERAL *v.* ASPINALL.

missioners, alleged that the mayor, bailiffs, and burgesses of *Liverpool*, or the Common Council had formed a design to appropriate a large part of the property of the corporation, and of the income and annual produce thereof, for the purpose of permanently endowing the churches in *Liverpool*, and making a permanent provision for the ministers thereof, and to that end determined to raise the sum of 105,000*l.* on the security of the corporate property, and to vest that sum in trustees upon trust to divide the income thereof, amounting to 3,665*l.* among the incumbents of the churches in lieu of the stipends and income theretofore received by them from the gratuitous votes of the corporation, and from parish rates; that on the 7th of *November* 1835, it was resolved that property of the corporation called the *Salthouse Dock* estate, of the annual value of 2000*l.* and the *New Tobacco Warehouse* of the annual value of 4000*l.* should be mortgaged for the purpose of raising the required sum; that the property so intended to be mortgaged, was not applicable to the purpose intended, and that the proposed application of the money intended to be raised would be in contravention of the scope of the act of parliament and the intention of the legislature, and

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circumstances under which any purchase, sale, lease, demise, contract, or appropriation of any of the said lands, &c., shall have been made since the said 5th day of *June*, to order that the same shall not be called in question under the provisions of this act; and in such case as last aforesaid the same shall not be called in question or set aside or affected under the provisions of this act: provided always, that in every case in which such petition shall have been presented, it shall be lawful for his Majesty, if he shall think fit, to enlarge the time within which (in case his Majesty shall not think fit to make such order as aforesaid) the council may have power as aforesaid to call in question any purchase, sale, lease, demise, contract, or appropriation referred to in such petition.

1836.

The Attorney-General v. Aspinall.

and prejudicial to the rights and interests of the rate-payers of the borough of *Liverpool*.

The original information, after charging that the bond debts of the corporation amounted to 792,000*l.*; that there was reason to apprehend that the income would be insufficient to defray the expenses directed to be paid out of the corporate funds (which expenses, if the funds should be insufficient, were to be paid by a rate to be levied on the inhabitants of *Liverpool*), and after further charging that, if the intended appropriation for the benefit of the clergy should be made, an additional rate to the extent of such appropriation would be required; that a considerable part of the yearly income of the corporation was of an uncertain and fluctuating nature; and that, under such circumstances, it would be improvident and improper to contract any further debt, prayed an injunction to restrain the corporation from carrying into effect the proposed loan, and from borrowing or applying money for the intended purpose.

An injunction was, on the 21st of *November*, granted on the *ex parte* application of the relators to the effect prayed by the bill. On the 28th of *November*, a motion was made to dissolve the injunction before the present Lord Chancellor, when Master of the Rolls, and the injunction was dissolved on the 1st of *December*. The argument and judgment on that motion are reported in the first volume of *Mylne and Craig's Reports*, p. 171.

The injunction being dissolved, the corporation proceeded to complete the act they had meditated; they borrowed the sum of 63,440*l.* on the security of the corporate estates; to this they added the sum of 41,560*l.*, the money of the corporation; and these two sums, making together the sum of 105,000*l.*, were paid to *James*

1836.

The Attorney-General v. Aspinall.

James Aspinall and the other Defendants, the trustees, on the trusts declared by an indenture, dated the 21st of *December* 1835.

By that indenture, after reciting that the patronage, advowson, or right of presentation to the rectory of *Liverpool*, and the other churches in *Liverpool* therein named, and the election of the curate of the church of *St. George* were vested in the mayor, aldermen, bailiffs, and common council of *Liverpool* for the time being, and reciting, that the endowment of the rectory of the parish of *Liverpool* was charged on the rates of the parish, and that the endowment and also the provision made by law for the officiating ministers of the other churches were insufficient for the due support of the rectors and other ministers, and that the common council, deeming it expedient that the inhabitants of the town of *Liverpool* should, as far as was practicable, be for ever released from the charge on the rates for the endowment of the rectory, and that in lieu of such charge, compensation, and perpetual provision for the rector, and provision for the ministers of the other churches should be made out of the estates of the corporation, had resolved that the sum of 105,000*l.* should be appropriated and paid to *James Aspinall* and others on the trusts hereinafter mentioned, and reciting that the common council had paid the said sum of 105,000*l.* to *James Aspinall* and the other parties therein named accordingly, it was witnessed, agreed, and declared between the parties thereto, and the mayor, bailiffs, and burgesses directed that the said *James Aspinall* and the other parties thereto, their successors, executors, administrators, and assigns should stand possessed of the said sum of 105,000*l.* upon trust out of the interest, income, and annual produce thereof, to pay to the rectors, curates, and other ministers of *Liverpool*, the several sums

1836.

The Attorney-General v. Aspinall.

therein mentioned. And it was provided and declared by the indenture, that the yearly stipend thereby directed to be paid to each of the rectors, and every future rector of *Liverpool* was so directed to be paid on the express condition that the rector should accept the same in lieu of and satisfaction of a yearly rate or assessment directed to be made under the act of the 10 & 11 *W.* 3., and also in lieu and satisfaction of an additional sum directed to be yearly levied under an act of the 26 *G.* 3. And that the provisions thereby made for the rectors and ministers should be deemed and taken to be in full satisfaction of all stipends, provisions, and allowances which during seven years next before the 5th of *June* then last had been made to the same rectors and ministers, and of all bonds which they might have been entitled to for securing the same. And it was further provided, that the trustees should pay to the treasurer of the borough such parts of the dividends and interest of the said trust-monies as should remain after satisfying the trusts aforesaid.

The supplemental information, after stating the dissolution of the injunction, the appropriation of the sum of 105,000*l.*, and the indenture by which the trusts of that appropriation were declared, proceeded to state that the officers and other members of the late corporation of *Liverpool* went out of office on the 26th of *December* 1835, when councillors were duly chosen for the borough, and aldermen and a mayor were also subsequently chosen, pursuant to the provisions of the act, and that a treasurer had since been duly appointed. And his Majesty's Attorney-General submitted that the said mortgage and appropriation of the property and effects of the corporation were a misapplication of the property and funds of the corporation; and that, after the passing of the act for the regulation of municipal corpo-

1836.

The Attorney-General v. Aspinall.

corporations, the said corporation, or the governing body thereof could not lawfully make such appropriation, and that the same ought to be set aside. And the information charged that the mayor, aldermen, and burgesses of *Liverpool* had been advised, and admitted that the said appropriation was invalid and were desirous that the said sum of 105.000*l.* should be repaid by the trustees to the corporation; and that they had, in fact, applied to the trustees to repay the same; but they refused to take any further steps to procure the repayment thereof.

Mr. *Pemberton* and Mr. *Turner*, in support of the demurrer.

The frame of the present information differs materially from that of the information originally filed; it is free from irrelevant and offensive matter, and its object appears to be to obtain the opinion of the Court at the least possible expence. So far as the form of the information is concerned, it is due to the parties filing it to make this admission, but this is all that can be conceded to them; for, in substance, they have not the slightest title to call upon this Court for its interposition. It is admitted, and, indeed, made a charge in this information, that the existing corporation have refused to take any proceedings for the purpose of setting aside what has been done by their predecessors. They are satisfied with the measures which have been taken by the late corporation for the purpose of securing a permanent provision for the clergy of *Liverpool;* and, in refusing to disturb the acts of their predecessors, they have acted both wisely and honestly. The two persons, who have come forward as relators, are wholly unconnected with the town of *Liverpool*, and if it depend upon the discretion of the Attorney-Ge-

1836.

The Attorney-General v. Aspinall.

neral to give or withhold his sanction to an information at the suit of relators, — a proposition which has been treated as doubtful, for it has been said that the office of Attorney-General is merely ministerial in this respect, and that he has no discretion to exercise, — it would be difficult to conjecture the grounds upon which the Attorney-General has lent the sanction of his name to this information. It is not even alleged that the provision, which has been secured by the late corporation for the clergy of *Liverpool*, is an improper or extravagant provision; it is acquiesced in by the new corporation, and, for aught that appears upon this record, it may be entirely approved by every one of the rate-payers of *Liverpool*. If the Attorney-General has no discretion to exercise, but conceives himself bound to give his nominal sanction to all informations brought by relators, ought the Court to sanction an information by which two individuals, wholly unconnected with *Liverpool*, under pretence of discharging a public duty in behalf of the inhabitants of that borough, seek to set aside proceedings with which, for any thing that appears to the contrary, the corporation and the whole of the inhabitants of *Liverpool* are perfectly satisfied? If, on the other hand, the Attorney-General has a discretion to exercise, has it, upon this occasion, been soundly and properly exercised?

Supposing, however, the new council not to have approved of, or acquiesced in, the appropriation, and that, though they refuse, as is alleged, to take any steps to procure the repayment of the 105,000*l.*, they are, nevertheless, acting in concert with the relators in this information. Such a proceeding, on their part, would be an attempt to evade the control given to the King in council, in that part of the 97th section which provides that it shall be lawful for his Majesty, with the advice of

1836.

The ATTORNEY-GENERAL *v.* ASPINALL.

of his privy council, upon petition, setting forth the special circumstances under which any appropriation shall have been made since the 5th of *June*, to order that the same shall not be called in question under the provisions of the act. For any thing that appears to the contrary the new council may have actually taken steps, in pursuance of the 97th section, to call in question the appropriation, and, upon a petition presented to the privy council on the part of the trustees and the clergy, the proceedings of the new council may have been restrained. In that case, the filing of the present information would be an attempt to bring before the Court a matter which was already *res judicata* by the proper tribunal appointed by the act. And whether the new council has actually called the appropriation in question in the manner pointed out by the act, and has been restrained by the King in council, or whether the new council has declined to exercise its discretion, the argument against the jurisdiction of this Court is equally strong, and this demurrer ought to be allowed.

The sole ground, upon which the relators in this information rest their case, is the alleged illegality of the transaction, which they seek to set aside, on the part of the old corporation; and the question of the legality or illegality of that proceeding must depend upon the construction of the act of parliament considered in connection with the rights of the body on which it was to operate at the time of its coming into operation. Now it is a proposition which admits of no dispute, that a corporation has the absolute right of dealing with its own property as it may think fit; it may waste, alienate, and destroy it, and it was to correct the possible abuse of that absolute power, in the interval between the passing of the act and the period at which it was to come into operation, that a special

1836.

The Attorney-General v. Aspinall.

remedy is provided by the ninety-seventh section of the act. That the corporation of *Liverpool* had the absolute dominion over their own property, except in so far as it was controlled by the ninety-second and ninety-seventh sections of the act was admitted in the argument on the motion for the injunction, but Lord *Cottenham* in his judgment upon that motion (*a*), said that "although a body having a corporate existence is capable of acquiring and possessing property, and therefore, also of disposing of it, if property is held by a corporation as a trustee, if the corporation holds it clothed with public duties, the Court has always asserted its right to interfere." But the real question is whether, admitting that, under the ninety-second section, certain trusts attached upon this property, those trusts attached upon the property as it existed at the date of the act, or as it would exist at the time when the act was to come into operation; and that is a distinction which seems not to have been adverted to in the argument upon the motion. It is not necessary, for the purposes of the present argument, to dispute the proposition laid down by Lord *Cottenham* in his judgment, that, the property of the corporation being subjected to a trust, the Court would not suffer the property to be withdrawn from the purposes of that trust; but the question is, when the trust was, according to the true construction of the act, to attach, for until the trust attached, the dominion of the corporation over its own property, admitted to have been uncontrolled and uncontrollable till the passing of the act, could not be affected. It is impossible to read the ninety-second clause, and deny that trusts were created by that clause; and it seems equally impossible not to come to the conclusion that these trusts

(*a*) 1 *Mylne & Craig*, 201.

1836.

The Attorney-General v. Aspinall.

trusts attached upon the property belonging to the corporation at the time when the new body was to be constituted, and the treasurer elected, and not till then. What is the income the treasurer is to receive? The income of the property belonging to the corporation of which he is the treasurer. When the treasurer is appointed, the act provides that the income of all the property of the corporation shall pass through his hands and be applicable to the purposes specified in the act. But then it is asked, could the legislature mean to leave the old corporation at liberty to defeat the trusts which the ninety-second clause created, by the alienation of all their property in the intermediate period between the passing of the act and its coming into operation? No; the legislature has guarded against any inconvenience, which might have arisen from the improper exercise of the power left in the old corporation, by the provisions contained in the ninety-seventh section; provisions which would have been altogether nugatory and unnecessary, if it had been intended that the corporation should be at once divested of the control over its property, and that the trusts created by the ninety-second section should attach upon that property, not as it might exist at the time when the new council should be constituted, but as it existed at the date of the act. One of the general rules to be observed in construing an act of parliament is, that, where a pre-existing right is to be controlled, no more of that right shall be held to be taken away, than is taken away either by express words or by necessary implication. Here, there is not only no express enactment by which the old corporation is deprived of its powers in the interval between the passing of the act and its coming into operation; but the ninety-seventh section provides a particular mode by which the undue exercise of these powers may be called in question. It

1836.

The Attorney-General v. Aspinall.

is a settled rule of construction, that where a statute introduces new regulations, and a particular remedy is pointed out against the infringement of the new law, that remedy is exclusive of all others: *Stradling's case* (*a*), *Foster's case* (*b*), *Castle's case* (*c*), *King* v. *Dixon* (*d*). In a note to *The King* v. *Dickenson* (*e*), Serjeant *Williams* states the distinction to be, that, "where a statute makes unlawful that which was lawful before, and appoints a specific remedy, that remedy must be pursued, and no other. But, where an offence was antecedently punishable by a common law proceeding, as by indictment, &c., and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had either at common law, or under the statute."

The ground upon which the interference of the Court is called for is a purely legal one; the propriety of the transaction is not attempted to be impugned, but it is said that however fit, however convenient, however necessary the transaction may have been, it ought to be set aside, because it is contrary to law. If that be so, and if the ninety-seventh section does not, as is submitted on the part of the Defendants, preclude recourse to any tribunal, except to the peculiar tribunal thereby constituted, let the corporation seek a remedy in a court of law by bringing an action for money had and received. If the transaction be questionable, it is questionable only, according to the terms of the act, by the new council, and if the new council refuses to interpose, there is no equity to support this information; and even if there were any ground, which there is not, for impeaching

(*a*) *Plowd.* 206 *b.*
(*b*) 11 *Co.* 37.
(*c*) *Cro. Jac.* 643.
(*d*) 11 *Mod.* 337.
(*e*) 1 *Saund.* by *Williams*, 135. *b.*

peaching the legality of the transaction, this Court has no jurisdiction to entertain that question, and the demurrer must consequently be allowed.

The Attorney-General, the *Solicitor-General*, Mr. *Kindersley*, and Mr. *Booth*, *contrà*.

The Attorney-General appears, upon this occasion, as counsel for the relators, not in his character of one of the law officers of the Crown. As to the observations which have been made on his conduct in sanctioning this information, he has done so in conformity with the wishes of a large proportion of the rate-payers of *Liverpool*, and he would have ill discharged his duty if, by refusing the sanction of his name to parties who considered themselves aggrieved, he had withheld from them the opportunity of having their rights determined by the regular tribunal of the country. If, as is contended on the other side, the only mode of impeaching the proceeding of the late corporation of *Liverpool*, is by the present town council summoning a jury for the purpose of determining whether the mortgage and appropriation were collusive, this court has no jurisdiction; but, if the Court should be of opinion that it has jurisdiction, then this information is properly filed by the Attorney-General on behalf of the *cestuis que trust*, the inhabitants and rate-payers of *Liverpool*, who are injured by the appropriation complained of; or it might have been filed by the Attorney-General, representing the King as *parens patriæ*, without any relators at all. In the *Attorney-General* v. *The Mayor of Dublin*. (*a*) Lord *Redesdale* says, "The King, as *parens patriæ* may institute a suit by the Attorney-General; it is not essential that relators should join in the suit, but it is the course to join them in the suit, in order that the defendants may

(*a*) 1 *Bligh N. S.* 312.

1836.

The Attorney-General v. Aspinall.

may not be oppressed without remedy by vexatious suits, the relators being liable to costs which are never paid by the Crown." Whether the relators have an interest or not, therefore, is immaterial, so far as the question of jurisdiction is concerned; but it is clear that, as inhabitants of *Liverpool*, they have an interest in the reduction of the borough dues, which cannot be reduced so long as there is a subsisting debt due from the borough. Now the information alleges that there is a subsisting debt of nearly a million of money; if, therefore, this appropriation of the sum of 105,000*l.* for the endowment of the clergy of *Liverpool* can be supported, the time at which the dues can be lowered must necessarily be postponed. They have also an interest upon another ground; it is provided by the act that any surplus that may arise, after the borough fund has discharged the purposes to which it is appropriated, shall be applied to the benefit of the inhabitants of *Liverpool*. It is manifest that the inhabitants will be deprived of the benefit of that provision, if this sum of 105,000*l.* is to be appropriated to the endowment of the clergy of *Liverpool;* and the relators stand in the situation of *cestuis que trust* who will be aggrieved by such misappropriation.

It is not, however, the object of this information to cast any imputation upon the late corporation of *Liverpool*. Their motives in making this appropriation for the endowment of the clergy of *Liverpool*, were, no doubt, laudable; the object of the act, and the act itself, morally considered, were laudable; but what this information complains of is, that, in pursuing a laudable object, they have been guilty of a species of pious fraud — of an act which contravenes the intentions of the legislature, and which, in a legal sense, may be termed a gross fraud upon the act of parliament. The legislature

lature intended that the property of all corporations should be applied to particular purposes for the benefit of the community, as soon as the machinery could be put in motion by which it was to be so applied, and that, in the mean time, there should be no waste, misapplication, or destruction of that property.

The legal estate of the corporation in the corporate property continued until the election of the new council, but, from the time of the passing of the act, they held the legal estate in the property in trust for the purposes to which it was afterwards to be applied. The old corporation and the new are, no doubt, in a legal sense, identical; the effect of the act of parliament being exactly the same as if the King had granted a new charter to the old corporation. It is admitted, on the part of the relators, that from the passing of the act until the 26th of *December* the old council could do every act at law which they could have done before the passing of the act, and it is because their legal powers remained unaffected that relief is sought in this Court. The mortgage was a good legal mortgage, and the corporation had, at law, a right to the possession of the mortgage-money down to the 26th of *December;* but the question is, whether they had a beneficial as well as a legal interest in it, and whether, according to the true construction of the act of parliament, they did not hold it as trustees for the inhabitants and rate-payers of *Liverpool.* If they had a right, as it is contended, to waste, alienate, and destroy the property of the corporation, as well between the 9th of *September* and the 26th of *December* as before the passing of the act, it is admitted that this information cannot be sustained.

The sixty-eighth section of the act, which provides that all stipends to ministers which had been paid within seven years

1836.

The Attorney-General v. Asfinall.

years should be continued, clearly draws the line where protection as to payments made to the clergy was to cease, and amounts to a virtual prohibition of a future endowment. The 139th section directs that all advowsons should be sold, and the produce of sale carried to the borough fund for the benefit of the inhabitants. Is not this a clear declaration that, from the passing of the act, corporations should have nothing to do with ecclesiastical matters, and that, thenceforth, municipal corporations should be confined to the legitimate purposes for which they were instituted; namely, the good government of the towns with reference to matters of police, local improvements, and the like secular objects? The resolution of the corporation to secure a permanent endowment to the clergy of *Liverpool* out of the corporate funds, and the mortgage by which they proceeded to carry that resolution into effect, are clearly inconsistent with these clauses and with the whole scope and intention of the act.

How would this case stand, supposing the ninety-seventh section, which, it is contended, excludes the jurisdiction of this Court, were not in the act. It may be admitted that before the passing of the municipal corporation act, a corporation seised of property, not specifically applicable to any trust or charitable purpose, might deal with that property as it pleased; it might, as it is said, waste, alienate, and destroy it. If, therefore, the corporation of *Liverpool* had, before the passing of the act, sold all their property and divided it among each other, there would have been no remedy either at law or in equity, because Judges in courts of equity have found an insuperable difficulty in saying who were the *cestuis que trust* in such a case, or what municipal purposes were, even supposing corporations to be trustees for municipal purposes: *Attorney-General* v. *Corporation of*

1836.

The ATTORNEY-GENERAL *v.* ASPINALL.

of Caermarthen (*a*), *Mayor of Colchester* v. *Lowten* (*b*). But the moment the Municipal Corporation Act passed, that difficulty was removed, for the ninety-second section created a trust for the inhabitants of the borough, and the purposes to which the borough funds were to be devoted are distinctly defined. It is impossible to consider the ninety-second section, and the minute provisions in the ninety-third, ninety-fourth, and ninety-fifth sections by which the powers of the new council are limited and restricted, and to believe the legislature meant to leave to the old council, in the interval that was to elapse before the election of the new council, an unrestrained power to waste, alienate, and destroy. It is not denied that a trust was created by the ninety-second clause, but it is said that the trust did not attach until the election of a treasurer. But does not the admission that a trust was created by the ninety-second clause necessarily involve the consequence that the interest of the *cestuis que trust* would be protected by this Court from the time of the passing of the act? The inhabitants of *Liverpool* had a vested interest in remainder, which was not to come into enjoyment until the election of a treasurer, and it is a familiar branch of the jurisdiction of this Court to protect rights before they come into actual possession. Could the new corporation, between the 1st of *January* and the time when a treasurer was to be elected, have done what they pleased with the corporate property, and if not, where is the difference between their situation in that respect, and the situation of the old corporation between the 9th of *September* and the 26th of *December*, it being agreed on both sides that, in contemplation of law, the old and new corporations are identically the same beings?

The

(*a*) *Coop.* 50. (*b*) 1 *V. & B.* 226.

1836.

The Attorney-General v. Aspinall.

The bankrupt laws furnish an analogy in illustration of the effect of the appropriation made by the old corporation, considered as a fraud upon the act of parliament. The property of a bankrupt is vested in his assignees by the bankrupt acts from the time of his committing an act of bankruptcy, and, however insolvent he may be, he is *sui juris* until that time. It was not till a recent alteration of the law, that a fraudulent preference of a creditor constituted an act of bankruptcy, yet, before that alteration, a voluntary payment to a creditor, in contemplation of an act of bankruptcy, was held to be a fraud upon the bankrupt laws. And further, a conveyance of all a trader's property, though upon trust to distribute it equally among all his creditors, that is, in the same manner as it would be distributed if he became a bankrupt, has been held to be a fraud upon the bankrupt laws, and itself to constitute an act of bankruptcy; because, though the end might be the same, a different machinery is substituted for that which the law has provided. So in *The Attorney-General* v. *The Duke of Marlborough* (*a*), where one of the objects of the information was to restrain the Duke of *Marlborough* from cutting timber, the Vice-Chancellor, (Sir *John Leach*) upon the argument of a demurrer, was of opinion that the provisions of the 3d & 4th of *Anne*, by which the Duke was restrained from barring issue and those in remainder, did not affect his other legal rights as tenant in tail; but, upon subsequently referring to the 5 *Anne c.* 4. by which a pension is settled on the Duke of *Marlborough* and his posterity, he was of opinion that the public had an interest in the maintenance of *Blenheim House*, that it would be a fraud upon that act to allow the Duke an unrestrained right

(*a*) 3 *Mad.* 498.

right to cut timber, and upon that ground overruled the demurrer.

Lord *Cottenham*'s opinion is, that if the ninety-second clause be considered as if it stood alone, there is not the slightest doubt that this Court has jurisdiction. And indeed, if the Court had jurisdiction to grant the injunction in the time of the old corporation, it seems necessarily to follow that the Court has jurisdiction to entertain the information, and that this demurrer must be overruled.

Then comes the question whether the case is varied by the operation of the ninety-seventh section. The cases, referred to on the other side, are cases where a new law has been introduced, and particularly where a new offence has been created, and in such cases the remedy designated by the act has, undoubtedly, been strictly followed. But the rule is not applicable to cases where a new right is created, as in the present case, where property before held beneficially by a body corporate is declared to be thereafter held by that body as trustees. The Municipal Corporation Act does not create a new law, but it establishes a certain relation between corporations as trustees, and the inhabitants of the borough as *cestuis que trust*, and the subsisting law which enforces the rights of the one, and makes the other accountable for a violation of the trust, remains unaltered.

But the act of the old corporation impeached by this information is not within the ninety-seventh section, nor is it competent to the new council to impeach it by the mode there pointed out for calling in question the acts of their predecessors. The word "mortgage" is not mentioned in that section, and if the transaction complained

1836.

The Attorney-General v. Aspinall.

plained of is *casus omissus*, the argument stands exactly as it did upon the former supposition, namely, that the ninety-seventh clause was altogether out of the act. The mode pointed out by the ninety-seventh clause in which the new council may call in question sales, purchases, leases, &c. made between the 5th of *July* and the time of their election is applicable, and intended to be applied only to cases in which a jury can be summoned, and properly dispose of the question, and is wholly inapplicable to the case made by this information. Upon these grounds it is submitted that this Court retains that jurisdiction, which beyond all question it possessed at the time when the injunction was granted, and that this demurrer ought to be overruled.

Mr. *Pemberton*, in reply.

July 4.

The Master *of the* Rolls (after stating the substance of the information.)

The transaction, carried into effect by the indenture of the 21st of *December* 1821, purported to be and was an appropriation of the 105,000*l.* of the monies of the corporation for the endowment of the clergy. The considerations for it were as follows: — 1. The persons chargeable with the rates or assessments authorised by the stat. 10 & 11 *G.* 3. and 26 *G.* 3. were relieved from those rates. 2. The corporation funds were relieved from the allowances which had been afforded for seven years. 3. The corporation acquired such, if any, advantage as might be made by sale of the increased value of the advowsons and rights of presentation. 4. The inhabitants of *Liverpool* of the Established Church

Church acquired what is alleged to be the advantage of a better endowed clergy.

A few days after the execution of this deed, the new government of the corporation was constituted under the act, and the present supplemental information was filed. The relators allege that the appropriation, which has been made, is a misapplication of the property of the corporation; that, after the passing of the act, the governing body of the corporation could not lawfully make the appropriation, and that it ought to be set aside by this Court, and it is thereupon desired that the money may be repaid.

The present information alleges no fraud, collusion, or improvidence. It does not allege, as facts, several important circumstances which are stated to be charged in the original information, but proceeds on the ground that the appropriation was illegal, and that the Court has authority which ought to be exercised to set it aside. Both the grounds depend on the construction of the act of parliament, which it is necessary to examine more particularly. By the act which contemplated an alteration in the government of boroughs, it was intended that the newly constituted governing bodies of the boroughs should be completed on the 9th of *November*, and in order to that end, proceedings were directed to commence on the 5th of *September*, on which day the act had not become a law; but, under a power given for the purpose, the time of commencing proceedings was postponed till the 5th of *November*, and the time of completing the new governing body was postponed to the 1st of *January*. The act, by its first section, repealed and annulled so much of all laws, statutes, and usages, and so much of all charters, grants, and letters patent as were inconsistent with or contrary

1836.

The Attorney-General v. Aspinall.

to the provisions of the act. The fifty-eighth section directed that the council in every borough should in every year appoint a fit person to be treasurer of the borough. The sixty-eighth section enacted that all stipends and allowances which, during seven years next before the 5th of *June*, had been annually paid and granted to the ministers of any church or chapel by the borough, should be secured to every person accustomed to have and receive the same by bond under the common seal of the borough. The information states that gratuitous payments amounting to the annual sum of 1865*l.* a year had been made for more than seven years by the corporation of *Liverpool*. The persons who were accustomed to receive these allowances had, therefore, a right to have them secured; and the appropriation of the 21st of *December* relieved the corporation from that obligation.

The ninety-second section enacts, &c. (His Lordship read the section.)

The effect of this clause has been variously discussed at the bar: on the one hand, it alleged that the clause had no operation till after the appointment of the treasurer, and that, till that event took place, the corporation under its old governing body was entitled to dispose of the corporate property as freely as if the act had not passed. On the other hand, it was contended that the act bound the property, or at least fixed a trust upon it from the time of its passing, and that any appropriation of the property, which withdrew the application of the income from the purposes intended by the act after the appointment of the treasurer, ought to be considered as inconsistent with the act, and a fraud upon its provisions. The rate-payers, it was said, are the persons liable to make good any deficiency of the borough

1836.

The Attorney-General v. Aspinall.

borough fund to answer the purposes of the act, and, as soon as the act was passed, and the trust thereby attached, they had a right to insist in a court of equity that the property should not be so dealt with as to withdraw the future income from its application to the particular purposes mentioned in the act in the order thereby directed. I cannot fully concur with the argument on either side. I think that, upon the construction of the act, the legislature did not mean the old governing body of the corporation to be at liberty to dispose as they pleased of the corporate property during the interval between the passing of the act and the appointment of the treasurer, and did not mean to restrict the old governing body to the extent contended for by the relators.

It appears to me that, under the ninety-second section, and to some extent, the corporate property became affected by a trust immediately on the passing of the act; but that this trust was not intended, under all circumstances, to prevent the old governing body from alienating or appropriating the property, the income of which, if not alienated or appropriated, would have formed part of the borough fund. I conceive, also, that a more strict observance of the order in which the new council is to apply the borough fund has been contended for than the act requires.

The application is to be subject to the debt, that is, to the debt unredeemed, or so much thereof as the council shall be required, or shall deem it expedient to redeem. There being a debt unredeemed, and not required to be redeemed, if the council with a view to the general interests of the inhabitants did not think it expedient to redeem the same, they seem to have

1836.

The Attorney-General v. Aspinall.

had a discretion to leave it unredeemed, and to apply the fund to the other purposes mentioned in the act, notwithstanding the possible consequence of the inhabitants continuing subject to a rate which might otherwise be dispensed with. The ninety-fourth, ninety-fifth, and ninety-sixth sections of the act define the limits within which corporations are to act in granting and renewing leases. The ninety-seventh clause is very important to be considered on the present occasion. Two questions arise upon the construction of it; whether the appropriation complained of falls within its provisions, and, if it does, whether the proceeding thereby directed excludes, or makes it unfit to exercise the jurisdiction of this Court. The clause authorises the council first elected to call in question all purchases, sales, leases, and demises, not made in pursuance of some *bonâ fide* covenant, contract, agreement, or resolution, made or entered into before the 5th day of *June;* all contracts for the purchase, sale, or demise of any lands, tenements, and hereditaments, and all divisions and appropriations of the monies, goods and valuable securities, or any part of the real or personal estate, of which, on the 5th day of *June*, the body corporate was seised or possessed, which shall have been made or contracted between the 5th day of *June*, and the day of election of the council first to be elected.

Now as the appropriation here in question was an appropriation of the monies or estate of the corporation made between the 5th day of *June* and the day of election of the council, it is, if we stop at the description, to be considered as falling within the number of those acts which the new council was authorised to call in question.

But

1836.

The Attorney-General v. Aspinall.

But it is said that the generality of the description is cut down by the subsequent words of the same clause which direct the mode of procedure. The purport of this part of the clause, as applicable to the present case, is that, for the purpose of calling in question an appropriation, if it shall appear to the council that there was ground for believing that the appropriation was collusively made for an inadequate consideration, it shall be lawful for the council to cause the value of the premises (*i. e.* the estates appropriated) to be inquired of by a jury, and in order thereto, to summon before the jury persons holding deeds, &c., and to cause such deeds to be produced, and to examine witnesses, and use lawful means for acquiring information, and the jury shall find the value of the premises (*i. e.* the estates appropriated), and the consideration which shall have been given, and also, that which ought of right to have been given for the appropriation. And if the jury shall find that a consideration less than the value shall have been collusively given by the terms of any appropriation, the party to such appropriation shall have his option to restore the premises, and abandon the contract upon receipt of the consideration given, or to give therefore an additional consideration. The words are not clearly adapted to meet this particular case, in which the amount or value of the money appropriated admits of no question; but the consideration for the appropriation would have been a proper subject of inquiry, and I cannot say that the general effect of the preceding words does appear to me to be taken away by the words directing the mode of proceeding, and I therefore think that, under the ninety-seventh clause, the new council might, if they had thought fit, have called in question the appropriation which is the subject of this information.

1836.

The Attorney-General v. Aspinall.

The same clause of the act has a proviso, enabling his Majesty by the advice of his privy council, upon petition setting forth the special circumstances under which any appropriation was made, to order that the same shall not be called in question under the provisions of the act, and it is contended, on the part of the Defendants, that there is no other remedy. The argument is, that the act is a new law by which rights and interests not before possessed by the inhabitants of boroughs are given to them, and by which the corporations, as distinguished from the inhabitants, not members of the corporation, are deprived of the exclusive interests which they previously had; and that, by analogy to the case in which an offence is constituted by a new law which at the same time directs a specific mode of prosecution, no other mode of proceeding should be allowed.

The calling in question, which the clause provides for is, a calling in question of the acts of the corporation under its old governing body by the corporation under its new governing body in a particular mode. The corporation, however varied both in its governing body and in the persons interested in the application of its property, was a continuing corporation. The new governing body represents, or was intended to represent, the interests of the inhabitants, and the power is given to the new governing body for the benefit of the inhabitants, and to prevent an application of the property prejudicial to the interests of the inhabitants by the old governing body. But I think that the provision of the particular remedy given by the ninety-seventh clause does not exclude the jurisdiction of this Court if a proper case for relief were made.

Does

1836.

The Attorney-General v. Aspinall.

Does the supplemental information shew such a case as makes it proper for this Court to interfere?

There is no allegation of fraud, collusion, or improvidence, or of any injury done or likely to happen to the rate-payers or inhabitants. The particular charges introduced into the original information are omitted; and it is charged, that the mayor, aldermen, and burgesses are advised and admit that the appropriation is invalid, and that they are desirous that the 105,000*l.* should be repaid, and have applied to the trustees to repay the same, but refuse to take any steps to procure the repayment without the sanction and direction of this Court.

I can only construe this charge as a statement that the new council, which is specially authorised to interfere, refuses to do so, and that, without any supposed collusion between them and the persons claiming the benefit of the appropriation; and, notwithstanding the other statements comprised in the same charge, it is difficult for me not to conclude from the refusal to proceed, that in the opinion of the new council the appropriation is beneficial to the inhabitants. If I were at liberty to suppose them acting in concert with the relators, it would seem like an attempt to evade the control which the act intended to give to the King in council. This control was to be exercised upon a petition setting forth the special circumstances of the appropriation, and I may conceive, as suggested at the bar, that the new council, insisting that the appropriation was invalid, commenced proceedings, which, on a petition of the trustees or of the clergy setting forth the special circumstances, were restrained. If this were done, it may well be doubted whether an information for the

1836.

The Attorney-General v. Aspinall.

same matter could be sustained; and if not in those circumstances, why is it maintainable in a case where the proceedings might have taken place, but did not, merely because the new council who had the option and discretion, refused to act?

On the whole of this case, conceiving that to some extent and to some purposes a new trust did attach on the corporate property on the passing of the act, but that the old governing body was not forbidden or precluded from a fair application of the corporate property for the benefit of the inhabitants —not being able to say that an application of the property for the more secure endowment of the ministers of the Established Church, performing divine service in the churches and chapels of the borough, is not, under the circumstances of this case, an application which must legally be considered beneficial to the inhabitants of the borough — considering the case within the meaning of the ninety-seventh section, without saying that in no case whatever this Court might not have had jurisdiction although the ninety-seventh clause was applicable, but thinking it a case in which the remedy given by that section ought to have been resorted to, and having regard to the nature of the charges in the information, it does not appear to me that, supposing all the allegations which it contains to be true, I could decree the relief which is prayed for, or any other relief, and therefore I think that the demurrer is to be allowed.

1837.

PALMER *v.* GRAVES.

1837.
March 6. 8.

THE bill was filed by *Robert Palmer* on behalf of himself and all other the creditors of *James Graves*, deceased, against *John Graves*, the executor of the deceased testator, and parties interested under his will.

The testator commenced his will with the following words: — "In the first place, I direct my just debts, funeral expences, and the charges of proving this my will to be duly paid." He then gave to his son, *James Graves*, 1*s.* and no more. He also gave, devised, and bequeathed to *Benjamin Haslam* and *Helen*, his wife, as tenants in common, and to *Robert Rathill* and *Isabella* his wife, his two leasehold messuages therein described. He also gave, devised, and bequeathed unto *George Thorpe* and *Thomas Thorpe* his leasehold messuage, cottage, land, garden, and premises therein described, charged and chargeable as therein mentioned, to hold the same unto *George Thorpe* and *Thomas Thorpe*, their executors, administrators, and assigns, as tenants in common, subject as therein mentioned (that is to say) upon trust, and subject to pay or raise the sum of 200*l.* for *Selina Haslam*, *Benjamin Haslam*, *Henry Haslam*, and *John Haslam*, the four children of *Benjamin* and *Helen Haslam*; but in case the said four children should die before they or any of them attained the age of twenty-five years, then he directed the said 200*l.* to be paid to the child or children of *Robert* and *Isabella Rathill*, who should be living at the decease of the survivor of the four children of *Benjamin* and *Helen Haslam*, as joint tenants and not as tenants in common.

The testator commenced his will with the words, "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid." He then made several devises, and he gave to *J. G.* a small quantity of plate, together with the rents and profits of his freehold and leasehold premises due and accruing up to the quarter day next after his decease; which rents and profits he charged with the payment of his said debts, funeral expenses, and the charges of proving his will:

Held, that the testator had not charged his real estates generally with the payment of his debts.

1837.

PALMER v. GRAVES.

common. He gave, devised, and bequeathed to his son *John Graves*, the two freehold messuages therein described, to hold the same unto the said *John Graves*, his heirs and assigns, to and for his and their absolute use and benefit for ever, subject as therein mentioned, (that is to say) in case the said *John Graves* should die leaving a widow surviving him, then he gave, devised, and bequeathed to her, for her life, the said two last-mentioned messuages and premises, and from and after the decease of the said *John Graves* and his widow, he gave, devised, and bequeathed the said two last-mentioned freehold messuages and premises unto the said *Benjamin Haslam* and *Helen* his wife, and *Robert Rathill* and *Isabella* his wife, their several and respective heirs and assigns for ever. He gave, devised, and bequeathed unto *Benjamin Haslam* and *Helen* his wife, his two freehold messuages and premises, and also his three freehold messuages or tenements therein described, to hold the same unto the said *Benjamin Haslam* and *Helen* his wife, their, his, or her heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, absolutely, for ever. And he gave, devised, and bequeathed unto his son, *John Graves*, his heirs, executors, administrators, and assigns, all the rest, residue, and remainder of his freehold and personal, and other his property, estate, and effects, not therein specifically devised and bequeathed; and he gave and bequeathed unto the said *John Graves*, his executors and administrators, his silver service of plate, consisting of a teapot, sugar basin, and cream ewer, together with the rents and profits of his freehold and leasehold hereditaments and premises, due and accruing up to what is commonly termed a quarter day, which should ensue next after his decease; which rents and profits he charged with the payment of his said debts, funeral expences, and the charges

charges of proving his will; and the testator, after making some other bequests, appointed *John Graves* sole executor and residuary legatee of his will.

The bill alleged that the testator was, during his life, and at the time of his death, a trader within the meaning of the laws concerning bankrupts, and it prayed that it might be declared that he was such trader, and that his real estates were liable to the payment of his debts within the 47 *G.* 3. *c.* 72.; but, if the Court should be of opinion that he was not such trader, then that the assets of the testator might be marshalled, and that an account might be taken of the testator's personal estate, and that his will might be declared well proved; and if his personal estate should be insufficient for the payment of his debts, then that the freehold estate, or a sufficient part thereof might be sold, and the monies arising from such sale applied to make good the deficiency of the personal estate.

In the result, it was ascertained that the testator was not a trader, and the question raised in the cause was, whether, according to the true construction of the will, the testator's real estate was charged with the payment of his debts.

Mr. *Bacon*, for the Plaintiff, submitted that the introductory words of the will created a charge upon the testator's real estates for the payment of his debts. *Clifford* v. *Lewis* (*a*) decided that it was not necessary that the words "in the first place" should be used, if the testator had in fact, in the first place, directed his debts to be paid. Here there were those words, as well as the fact that the direction to pay the testator's debts stood

(*a*) 6 *Mad.* 33.

1837.

PALMER v. GRAVES.

stood first in the will. Unless the introductory words, therefore, were controlled by some indication of a contrary intention in the subsequent part of his will, there was a clear charge upon the real estate. Now there were several specific devises of his real estates to different persons, all which must be taken to be subject to the primary charge, and the only part of the will upon which any doubt could be raised as to his intention in this respect, was that in which the testator gave his small service of plate to *John Graves*, together with the rents and profits of his freehold and leasehold estates, due and accruing up to the quarter day after his decease, which rents and profits he charged with the payment of his debts, funeral and testamentary expenses. The question was, whether this clause was to be considered as controlling the effect of the introductory words, or whether, as he submitted, the concluding words in the clause were not introduced by the testator *ex abundanti cautelâ*, that this particular gift of the rents and profits might not be considered as exempted from the general charge. This case was distinguishable from *Douce* v. *Lady Torrington* (*a*), for in that case there was no expression in the introductory clause shewing that the testator intended his debts to be in the first place paid; and there was also a disposition of a freehold estate in the codicil inconsistent with an intention to charge the real estates generally. It was also distinguishable from the late case of *Braithwaite* v. *Britain* (*b*), for there the introductory words which would have raised a general charge by implication upon the testator's real estates were controlled by subsequent devises of two freehold estates specifically charged with certain sums to be paid to the executors.

Mr.

(*a*) 2 *Mylne & Keen*, 600. (*b*) 1 *Keen*, 206.

Mr. *Chandless* and Mr. *Rogers*, *contrà*.

The words "in the first place," are used only in the sense of *imprimis*, and cannot be construed with reference to any unusual application of a fund not liable by law to the payment of debts. But, admitting that the introductory words would raise by implication a charge upon the real estate for the payment of debts, that implication is rebutted by the subsequent charge of a particular portion of the rents and profits with the payment of the testator's debts. The charge of a part is clearly inconsistent with an intention to charge the whole. But there is an objection in point of pleading, which precludes the Court from determining the question whether the real estate is or is not charged with the payment of the testator's debts. This is a creditor's bill, alleging that the deceased debtor was a trader within the meaning of the bankrupt acts, and claiming payment out of the real estate under the 47 *G.* 3. *c.* 74. The frame of the bill, therefore, assumes that there is no charge in the will on the testator's real estate (*a*), and the Court cannot, under the prayer for general relief, grant relief which is inconsistent with the case made by the bill.

Mr. *Bacon* in reply.

The bill prays that the will may be established, and that is sufficient to entitle the Plaintiff to the opinion of the Court on the construction of the will. The bill is in the nature of a bill framed with a double aspect, and the

(*a*) The 47 *G.* 3. *c.* 72. enacts, that "when any person, being at the time of his death a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments, or other real estate which he shall not by his last will have charged with or devised subject to or for the payment of his debts," &c.

1837.

PALMER v. GRAVES.

the prayer for the establishment of the will is equivalent to a prayer that if, as the fact has turned out, the testator was not a trader, his real estate may be declared to be charged with the payment of his debts.

The MASTER *of the* ROLLS overruled the objection in point of pleading, and on a subsequent day gave the following judgment on the question as to the charge.

March 8.

The question reserved in this case is, whether the testator has, by his will, charged all his real estates with the payment of his debts. He commences his will by saying, "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid." These words, if not limited or controlled by any thing else in the will, are sufficient to constitute a charge of all the real estates with the payment of debts; not a clear express charge upon all the testator's lands, but a charge by implication, capable of being explained by subsequent words, or a subsequent provision for the payment of the debts.

The testator, after employing the words I have stated, proceeds to make several devises and bequests, and then gives and bequeaths unto *John Graves* a small quantity of silver plate, together with the rents and profits of his freehold and leasehold premises due and accruing up to what is commonly termed a quarter day, which should ensue next after his decease, "which rents and profits I charge with the payment of my said debts, funeral expenses, and the charges of proving this my will." The will contains nothing else from which the testator's intention, as to the payment of his debts,

debts, can be collected, and on the authority of *Thomas* v. *Britnell* (*a*) and *Douce* v. *Lady Torrington* (*b*), I think the general charge by implication is controlled by the specific charge made in the subsequent part of the will.

I am, therefore, of opinion that, upon the whole, there is no general charge upon the testator's real estate for the payment of his debts.

(*a*) 2 *Ves.* sen. 313. (*b*) 2 *Mylne & Keen*, 600.

WHEATLEY *v.* PURR.

March 4.

HARRIET OLIVER, by her will, dated the 1st of *September* 1835, bequeathed to *George Oliver* and *Susan Oliver* the sum of 2000*l.* and other benefits, and appointed *Simpson*, since deceased, and the Defendant *Purr*, executors of her will.

In *September* 1826, *Susan Oliver* intermarried with *John Wheatley*: she died on the 16th of *July* 1831, in the life-time of the testatrix, leaving three children, issue of the marriage, who were the infant Plaintiffs, *John Richardson Wheatley*, *Susanna Mary Wheatley*, and *Harriet Wheatley*.

A sum of 2000*l.* was by the direction of *H. O.* carried by her bankers to an account in the joint names of herself, as trustee for the Plaintiffs, and the Plaintiffs; the bankers gave a promissory note for the amount payable in fourteen days with interest at 2½ per cent. to *H. O.*, trustee for the persons therein named. After the death of *H. O.* her executors received from the bankers the sum secured by the promissory note.

Held, that the transaction amounted to a complete declaration of trust, and that the executor was a trustee for the Plaintiffs in whose favour the trust was declared.

In

1837.

WHEATLEY v. PURR.

In the year 1833 the testatrix *Harriet Oliver* had in the hands of her bankers Messrs. *Oakes* & Co. of *Sudbury* in *Suffolk*, the sum of 3000*l.*, upon which sum the bankers allowed her interest at 2½ per cent. In the month of *June* in that year she gave notice to Messrs. *Oakes* & Co., by *Charles Partridge*, her confidential servant, that she would draw out the sum of 3000*l.* so deposited in the month of *July* following. She accordingly, on the 1st of *July*, delivered to *Partridge* a promissory note for 3000*l.*, which had been given by the bankers in acknowledgment of the deposit, and she desired him to deliver the same to the bankers, and to direct the bankers to place 2000*l.* in the joint names of the Plaintiffs and her own, as trustee for the Plaintiffs, and to bring back the remaining 1000*l.* with the interest accrued thereon. *Partridge* executed these instructions, and the sum of 2000*l.* was entered in the books of the bankers, to the account of *Harriet Oliver*, as trustee for *John Richardson Wheatley*, *Mary Wheatley*, and *Harriet Wheatley*, and the following receipt or order given for it:—

"*Sudbury* Bank, *July* 1st, 1833. Fourteen days after sight I promise to pay Mrs. *Harriet Oliver*, trustee for *John Richardson Wheatley*, *Mary Wheatley*, and *Harriet Wheatley*, or order, two thousand pounds, with interest at 2½ per cent. For *Oakes*, *Brown*, *Moore*, and *Hanbury*. (Signed) *Daniel Hanbury*."

A receipt for this promissory note was signed by Mrs. *Oliver*, and given to the bankers.

Harriet Oliver died on the 7th of *January* 1834, possessed of the above-mentioned promissory note, and her will was duly proved by *James Purr* alone, who possessed himself of her personal estate; and he obtained payment from Messrs. *Oakes* & Co. of the sum of 2000*l.* and

1837.

WHEATLEY v. PURR.

and interest, in discharge of the promissory note. The money so received was invested by the executor in the 3 per cent. consols, in his own name.

The bill was filed by the infant Plaintiffs, by *John Wheatley*, their father and next friend, and it prayed a declaration that *Harriet Oliver* was a trustee of the 2000*l.* and interest for the Plaintiffs, and that such principal sum and interest might be paid, or the stock in which the same had been invested transferred into the name of the Accountant-General in trust for the benefit of the Plaintiffs; and it further prayed for the usual reference as to their maintenance.

It appeared by the evidence of *Partridge* and *Pratt*, the principal clerks of Messrs. *Oakes* & Co., that Mrs. *Oliver*, on directing *Partridge* to give notice to the bankers that she intended to draw out the 3000*l.*, had expressed to *Partridge* her desire that 2000*l.* out of the 3000*l.* should be placed in the bank for the benefit of Mrs. *Wheatley*'s children; that *Partridge*, when he gave notice of her intention to the bankers, inquired how her wishes could be accomplished; and that *Pratt* suggested to *Partridge* that Mrs. *Oliver* might have a promissory note payable to her as trustee for the children, and that the old promissory note must be given up, and a new one to that effect prepared.

The question in the cause was, whether the Defendant was a trustee for the Plaintiffs, or for the next of kin, Mrs. *Oliver* having died intestate as to her residuary estate; and that depended upon the question whether the intention of Mrs. *Oliver*, (which was not disputed), to create a trust for the Plaintiffs had or had not been perfected,

1837.

WHEATLEY v. PURR.

Mr. *Barber* took a preliminary objection to the frame of the suit, on the ground that the next of kin of the testatrix ought to have been made parties, because, if the executor were a trustee for the Plaintiffs, the next of kin would have a separate interest, which they should be present to defend.

Mr. *Pigott* cited *Brown* v. *Douthwaite* (*a*), as an authority, showing that it was sufficient to bring the executor before the Court, where there were residuary legatees; and now, by the late act (*b*), the executor was declared a trustee for the next of kin wherever the residue was undisposed of. The next of kin therefore were sufficiently represented.

The MASTER of the ROLLS held that the next of kin were not necessary parties.

Mr. *Pemberton* and Mr. *Pigott*, for the Plaintiffs.

It is clear that in this case a declaration of trust was made by Mrs. *Oliver*, and that nothing was wanting to complete the act by which that declaration was carried into effect. This Court will not assist a volunteer; but if the act is completed, though voluntary, the Court will act upon it. A mere voluntary promise or agreement to create a trust will operate nothing; but if the voluntary promise or agreement is perfected by an act which constitutes the relation of trustee and *cestui que trust*, this Court will give effect to it. These principles are fully established by the authorities, and are clearly applicable to the present case. *Exparte Pye; exparte Dubost* (*c*).

Mr.

(*a*) 1 *Mad.* 446.
(*b*) 1 *W.* 4. *c.* 40.
(*c*) 18 *Ves.* 140.

Mr. *Barber* and Mr. *Jeremy*, *contrà*.

1837.

WHEATLEY v. PURR.

There can be no doubt of the intention of Mrs. *Oliver* to create a trust; but the trust was not perfected by any act done in her life-time; and the consequence was that the bankers found it impossible to resist the demand, made by the executor, for the sum secured by this promissory note, as part of Mrs. *Oliver*'s personal estate. Had it been a trust, the demand might have been resisted; for there cannot exist a trust to be worked out through the medium of assets, nothing being demandable against assets in the hands of an executor, except debt or legacy. Could the bankers, in Mrs. *Oliver*'s life-time, have refused to pay her this sum of 2,000*l*., or could the supposed *cestuis que trust* have sustained a bill against her claiming to have their interest in the promissory note secured for their benefit? That is the true test by which it is to be ascertained whether Mrs. *Oliver* had lost her control over the fund; whether it was a trust executed, or an imperfect act, which a court of equity would not carry into execution. In *Antrobus* v. *Smith* (*a*), there was an indorsement on a navigation share in the handwriting of the owner, declaring that he assigned the same to his daughter. The instrument so indorsed was found among the papers of the father's executrix, and was held upon a bill for an assignment, to be a voluntary and imperfect gift, which the Court could not execute. So in *Cotteen* v. *Missing* (*b*), a letter written by a residuary legatee to executors, consenting to a gift of 500*l*. to a daughter of the testator, not actually appropriated during the life-time of the writer of the letter, was held to be an imperfect gift, not amounting to a declaration of trust. *Gaskell* v. *Gaskell* (*c*), is a case not very dissimilar in its circumstances to

(*a*) 12 *Ves.* 39.
(*b*) 1 *Mad.* 176.
(*c*) 2 *Y. & J.* 502.

1837.

WHEATLEY v. PURR.

to the present. There the testator, in his life-time, directed his bankers to carry certain sums to the account of persons, whom he had previously by his will appointed trustees for his wife and son, and these sums were accordingly carried by the bankers, in their books, to the account of those persons. No notice of the appropriation was given to the trustees, and there was some evidence that the object of the testator was to evade the legacy duty. It was held that the appropriations were void, and that the funds must be accounted for as personal assets of the testator. That the decision in this case did not turn upon the attempt to evade the legacy duty, is evident from these observations of Lord Chief Baron *Alexander*: "If a man wholly denudes himself of property, and places it in trustees over whom he has no sort of control, I will not say he may not do so in such manner as may be effectual to defeat the legacy duty. It is not, however, necessary for me to give my opinion on such a case on the present occasion; for here I consider it to be clear, that the testator had not parted with all control over the fund." In *Tate* v. *Hilbert* (*a*), where a cheque on a banker and a promissory note were given without consideration, and the donor died before they were paid, it was held that these were not gifts which might be recovered in a court of equity. *Bayley* v. *Boulcott* (*b*), is also an authority which shews that the imperfect act, by which Mrs. *Oliver* indicated her intention of giving a benefit to the Plaintiffs, would not have bound her, but that it might at any time have been recalled.

Mr. *Pemberton*, in reply.

In all the cases cited on the other side, except *Gaskell*

(*a*) 2 *Ves.* jun. 111. (*b*) 4 *Russ.* 345.

1837.

WHEATLEY v. PURR.

Gaskell v. *Gaskell*, something was wanting, to render the act a complete declaration of trust, and therefore the intended gift failed. But if a person once constitutes himself a trustee for the benefit of another by a complete act or instrument in respect of the whole, or any portion of his property, the trust attaches, and the gift is irrevocable, though the act or instrument is never communicated to the *cestui que trust*. Some of the *dicta* in *Gaskell* v. *Gaskell* are extremely questionable, and it would be difficult to support the decision, except upon the ground that the transfer was fraudulent. In the present case, the fund in question is, no doubt, part of the personal estate of the testatrix, but it is a part of her personal estate, upon which she has fixed a trust for the benefit of the Plaintiffs. In *ex parte Pye, ex parte Dubost* (*a*), the testator had directed an agent in Paris to purchase an annuity for a lady, which was accordingly purchased, but in the name of the testator, the lady being deranged. The testator afterwards sent over a power of attorney, authorizing his agent to transfer the annuity to the lady. Before the annuity was transferred, the lady died, and Lord *Eldon*, with reference to this part of the case, says, "though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what appears to me a sufficient declaration that he held this part of the estate in trust for the annuitant (*b*)." Upon the same principle, and for a similar reason, this is not a demand against the assets of the testatrix in the hands of her executors, *quà* assets, but against a specific portion of her personal property, in respect of which the testatrix, by a declaration of trust, converted herself into a trustee for the benefit of the infant Plaintiffs.

The

(*a*) 18 *Ves.* 140. (*b*) *Ibid.* 150.

1837.

WHEATLEY
v.
PURR.

The MASTER *of the* ROLLS, (after stating the facts of the case,)

The question is, whether in the acts done by Mrs. *Oliver*, for the purpose of constituting herself a trustee for the benefit of Mrs. *Wheatley*'s infant children, any thing was wanting to accomplish her purpose. I am of opinion that she did constitute herself a trustee for the infant children, and that a trust was completely declared so as to give to the Plaintiffs a title to the relief which they claim. Upon the death of Mrs. *Oliver*, the bankers were called upon to pay the money by her executor, who had undoubtedly a right to claim it, in his character of legal personal representative, upon whom, if Mrs. *Oliver* was a trustee, the trust devolved. The executor received the money, as part of the general assets of the testator. Those assets it was his duty to defend against the claim of the Plaintiffs, until their right should be ascertained, and he has acted very properly, therefore, in refusing to part with the fund, without the authority of the Court.

1836.

Between Sir JOHN KENWARD SHAW, Bart., JOHN CORNWALL, the Rev. ROBERT WILLIAM SHAW, and the Rev. JOHN KENWARD SHAW BROOKE, Plaintiffs,
and WILLIAM BORRER, Defendant.

April 22, 23.
August 5.

THE bill was filed for the purpose of compelling the specific performance of an agreement, whereby the Defendant contracted to purchase a certain advowson from two of the Plaintiffs.

The advowson in question was devised by Sir *George Gregory Shaw*, and upon the construction of his will, dated the 13th of *April* 1831, the question of title arose.

The will commenced as follows:—"First, I direct all my just debts, funeral and testamentary expences to be paid and discharged with all convenient speed, after my decease; and I give and devise all that the advowson and right of patronage of and to the rectory or living of *Hurtsperpoint*, in the county of *Sussex*, with the rights, members, and appurtenances thereof, unto and to the use of my son *John Kenward Shaw* and *John Cornwall*, their

A testator, after commencing his will with words amounting to a charge of his real estate with the payment of his debts, devised an advowson to trustees upon trust t present his youngest son to the living when vacant, and subject thereto in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his resi-

duary real estate upon certain trusts to other trustees, and appointed three executors (who proved his will) one of whom was his youngest son, and another one of he trustees of the advowson.

The personal estate being insufficient for the payment of his debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson, before any vacancy had occurred in the living.

In a suit for specific performance by the Plaintiffs, the trustees of the advowson and executors, against the purchaser, it was held that, the charge being in effect a devise of the real estate in trust for the payment of debts, a good title could be made by the Plaintiffs, without the institution of a suit to ascertain the deficiency of the personal estate, and that the purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money.

1836.

SHAW v. BORRER.

their heirs and assigns, but upon trust, nevertheless, that they, or the survivor of them, or the heirs or assigns of such survivor, shall and do present my youngest son, *Robert William Shaw*, to the same, when and as the same rectory or living shall become vacant, and subject thereto upon trust that they, my said trustees, or the survivors, &c. do sell and absolutely dispose of the said advowson and right of patronage, either by public sale or private contract, as they or he may think fit, and do and shall pay the monies to arise by such sale, after defraying expences, unto and equally between all my daughters, who shall be then single and unmarried, in equal portions share and share alike. And the testator directed that the receipts of the trustees should be a good discharge for the purchase-money, and that the purchaser or purchasers should not be liable or accountable for the application, misapplication, or non-application thereof. The testator then gave a certain leasehold estate and furniture to trustees, upon trust to permit his eldest unmarried daughter to have the use thereof during her life, if she so long continued unmarried, and after her decease, or marriage, which should first happen, upon trust to permit his second, third, and all other his unmarried daughters, severally and successively, to have the use thereof; and after the decease or marriage of all his daughters, in trust for his son *John Kenward Shaw*, if he should be then living, but if not, then in trust for his eldest son, for the time being, his executors, administrators, and assigns. To this bequest of the leasehold estate and furniture, there was annexed a power of sale to be exercised under certain circumstances, with directions that the purchaser should not be liable to see to the application of the purchase-money. And after the death of his wife, the testator appointed and devised his manors, messuages, lands, and hereditaments whatsoever, to *Maximilian Dudley Digger Dalison*, and

1836.

SHAW v. BORRER.

and *John Cornwall*, and their heirs, upon trust, with all convenient speed, after the death of the testator's wife, to convey and settle the same, to the use of his eldest son *John Kenward Shaw*, and the heirs male of his body; and, for want of such issue, to his two grandsons, and the heirs male of their respective bodies, with several remainders over; and after giving his jewels to his wife absolutely, he gave his plate and household goods, &c., described in his will as belonging to his mansion-house at *Kenward*, to his wife, for her life, and after her death, to the trustees, *Dalison* and *Cornwall*, upon trust to permit the same to be used by the person who, by virtue of the will, should, for the time being, be entitled to the mansion-house at *Kenward*, to the intent that, as far as the rules of law and equity would permit, the same might be as heir-looms for the benefit of the successive owners of the mansion house; and for that purpose the testator declared that the same should not vest absolutely in the child of any of his children, until such child should attain the age of 21 years. And the testator, after giving directions respecting his farming stock, and giving to his wife all other his personal estate not before disposed of, appointed *John Kenward Shaw*, (who was one of the trustees of the advowson,) *Robert William Shaw*, (the son who was to be presented with the living, when it became vacant,) and *John Kenward Shaw Brooke*, executors of his will.

The testator died in the month of *October* 1831, and his will was proved by the executors named therein.

The contract was entered into by the Plaintiffs, Sir *John Kenward Shaw* and *John Cornwall*, the trustees of the advowson, as the bill alleged, in concurrence with, or at the request of the executors by *John Hayward*, their attorney, with the Defendant, *William*

1836.

SHAW v. BORRER.

William Borrer, for the sale of the advowson, at the sum of 8,400*l.* The bill was filed by the trustees of the advowson and the executors, and it prayed, in addition to the prayer for a specific performance of the contract, that the purchase-money might be paid to the executors.

The bill alleged that the testator, at his decease, was indebted to an amount far exceeding the personal estate which he was possessed of, at the time of his decease, and that the Plaintiffs, the executors, were under the necessity of having money raised for the payment of his debts, by the sale of his real estate, according to the direction contained in the will; and that the Plaintiff, Sir *John Kenward Shaw*, one of the executors, and also one of the devisees in trust of the advowson, was satisfied of such necessity, and therefore willing, in his character of devisee in trust, to concur with the executors in selling the same for the purpose of paying the testator's debts; and that the Plaintiff, *John Cornwall*, the other devisee in trust of the advowson, the Plaintiff, *Robert William Shaw*, who was beneficially entitled under the will to the next presentation of the advowson, and the daughters of the testator who were all single and unmarried, were all satisfied of the insufficiency of the testator's personal estate, and concurred in the necessity of such sale.

The Defendant, by his answer, denied all knowledge of the matters so alleged by the Plaintiffs, and insisted that he had contracted with the Plaintiffs, Sir *John Kenward Shaw* and *John Cornwall*, as trustees of the advowson, and with them only.

The cause was heard on the 21st of *April* 1834, and by the decree then made, a reference was directed to the Master, to inquire whether a good title could be made,

1836.

SHAW v. BORRER.

made, and if so, when it was first shewn. Evidence was gone into, before the Master, to shew the deficiency of the testator's personal estate; and the Master reported that a good title could be made, and was first shewn on the 18th of *December* 1832. To that report the Plaintiffs filed two exceptions; the first of which alleged that the Master ought to have certified that a good title could not be made.

The reasons assigned by the Defendant, for his first exception, were the following:—

1. That no vacancy having occurred in the living, and the testator's youngest son not having been presented, the time designated by the testator for selling the advowson had not yet arrived.

2. That if a good title could be made by a present sale of the advowson, it could only be with the consent of all persons who might have a beneficial interest in the advowson, if sold at the future time appointed by the will; whereas there were not proper persons now in *esse* competent to make a good title to the advowson, on a present sale thereof.

3. That no proper evidence was produced before the Master, to shew the deficiency of the personal estate, and other property of the testator, to answer his debts, or to prove the necessity of a present sale for the payment thereof, so as to justify the Master in stating that a good title could be made thereto by a present sale thereof for payment of the testator's debts.

Mr. *Tinney*, Mr. *Hodgson*, and Mr. *Longley*, in support of the exception.

The first objection to the title is that the time at which the

1836.

SHAW v. BORRER.

the power of sale can be exercised has not yet arrived, and that the trustees are bound to keep the advowson until a vacancy occurs in the living, when the testator's youngest son, *Robert William Shaw*, is to be presented to it. The trustees are to present the testator's youngest son, "*when* the rectory or living shall become vacant;" subject to that trust they are to sell the advowson, and to pay the monies arising from the sale "equally between all the testator's daughters who shall *then* be single and unmarried." The word *then* evidently refers to its correlative *when* in the clause relating to the vacancy; and it follows that the power of sale was not intended to be exercised until after the vacancy should have happened, and the youngest son have been presented to the living. If the time at which a power is to be exercised is fixed by a settlement or will, it cannot be accelerated: thus in *Coxe* v. *Day* (*a*), where a power of leasing was given to the father, tenant for life, and after his decease to the son, and the father conveyed his interest to the son, not noticing the power, it was held that the son had no power to lease during the life-time of his father. In the present case, until a vacancy in the living shall occur, it is impossible to say who are the parties interested in the sale of the advowson. The daughters will take nothing, unless they are living and unmarried at the time of sale; and if none of them should be living, or if they should all happen to be married at that time, the gift would go, according to the true construction of this will, not to the heir, but to the residuary devisee; and as the residuary devise is executory, the same question which was raised in *Jervoise* v. *The Duke of Northumberland* (*b*), would arise here; namely, whether the testator's eldest son would be entitled to an estate tail or an estate for life, a question involving

(*a*) 13 *East*, 118. (*b*) 1 *J. & W.* 539.

ing the points discussed in *Papillon* v. *Voice* (*a*), *Countess of Lincoln* v. *The Duke of Newcastle* (*b*), and *Deerhurst* v. *The Duke of St. Albans* (*c*), and which Lord *Eldon* in *Jervoise* v. *The Duke of Northumberland*, considered too doubtful to entitle the vendor to compel the purchaser to accept a title depending upon it. Hence the parties whose concurrence would be necessary in the present case to make a good title are not yet ascertained, nor ascertainable.

But there is another ground on which it is alleged that a good title can be made, which involves a point of great importance with reference to the administration of assets; one which may be said to be of first impression, for it has never yet been determined in this Court. It is said that there is a deficiency of the testator's personal estate for the payment of his debts, and that an immediate sum of 2756*l.* was wanted, which it was necessary to raise out of the sale of the advowson; and that the executors, under the general charge upon the real estate for the payment of debts in the testator's will, were entitled to sell the real estate with the concurrence of the trustees for that purpose. Of the alleged deficiency of the testator's personal estate for the payment of his debts, there is no sufficient, nor indeed any receivable proof; and the objection, on the part of the Defendant, is, admitting the general charge upon the real estate—a point, however, not free from doubt—that the charge gives no power to the executors to resort to the real estate, until the personal estate, which is the primary fund, shall be ascertained to be deficient; and that deficiency can only be ascertained in a suit for the administration of the assets instituted in this court.

(*a*) 2 *P. Wms.* 471.
(*b*) 12 *Ves.* 218.
(*c*) 5 *Mad.* 252.

1836.

SHAW v. BORRER.

court. If the personal estate is insufficient for the payment of the debts, then, and not till then, the real estate is to be resorted to—not indiscriminately, however, for it will depend upon the circumstances of the particular case what portion of the real estate is to be first applied. If there is descended estate, that will be first liable; and if there is a residuary devise, the residuary estate will, upon the authority of *Spong* v. *Spong*, determined in the House of Lords (*a*), be applicable before the specifically devised estates. This is the course in which the assets would be administered in this Court, and unless the testator has directed, or expressly vested a discretion in his trustees or executors to administer them differently, they cannot exercise a power, which, if the assets were administered here, the Court would not permit them to exercise. The late act of the 3 & 4 *W.* 4. *c.* 104. shews very strongly the view which the legislature has taken of this point; that act extends the provisions of the act of the 47 *G.* 3. *c.* 74., commonly called Sir *Samuel Romilly*'s Act, which rendered the real estate of a trader liable to the payment of his debts, to the real estate of all persons, whether traders or otherwise, not already charged by their wills with the payment of their debts; and it declared that such real estates shall be assets to be administered in a suit in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract, as on specialty. The legislature has by this act charged the real estate with the payment of debts where the testator has omitted so to charge it by his will, and in what manner is the real estate to be so applied? by a suit in equity. Is it not obvious that the legislature intended to put cases in which there was no charge by the will on the same footing as cases in which there was such a charge, and that

(*a*) 3 *Bligh*, N. S. 84.

1836.

SHAW v. BORRER.

that the assets in both cases are to be administered in the same manner.

The case of *Clifford* v. *Lewis* (*a*) was the first case in which the rule was laid down that a direction to pay debts in the commencement of a will imported a general and primary purpose that payment of debts should precede the subsequent dispositions made of the testator's property, and should, consequently, charge the real estate. The principle laid down in that case is somewhat shaken by the subsequent case of *Douce* v. Lady *Torrington* (*b*), decided

(*a*) 6 *Mad.* 33., but see *Thomas* v. *Britnell*, 2 *Ves. sen.* 313., where the same principle is laid down by Sir *Thomas Strange*.

(*b*) *Mylne & Keen*, 600. There is an ambiguity in the language of a passage in the judgment in *Douce* v. Lady *Torrington* which has led to the supposition that the decision in that case is inconsistent with the rule laid down in *Clifford* v. *Lewis*. If, in line 10, p. 606., 2 *Mylne & Keen*, the words "expression *of an intention*," or expression "*indicating an intention*" were substituted for the word "expression," the ambiguity would be removed; and it certainly appeared at first to the reporter, whose duty it was to report the case of *Douce* v. Lady *Torrington*, that some such words, as those above indicated in italics, had dropped out of the written judgment. The inference which, in argument at the bar, has been drawn from the passage as it stands in *Douce* v. Lady *Torrington*, is that the exact words of the introductory clause in *Clifford* v. *Lewis*, and, consequently, the principle upon which that case was decided, were not present to the recollection of the learned Judge when he decided *Douce* v. Lady *Torrington*, the judgment in which case was delivered immediately after the argument, and subsequently, according to the frequent usage of Sir *John Leach*, committed to writing. *Douce* v. Lady *Torrington* was reported at a time when the reporters were unfortunately deprived of the best means of removing the doubt by referring it to the learned Judge whose assistance, on any occasion of doubt or difficulty, had, with uniform readiness and kindness, been afforded to them in his lifetime. The words of the written judgment were, therefore, rigidly adhered to, though the reporters were aware of the doubt which was likely to arise, and which has arisen, from the ambiguity. It is believed that a careful comparison of the language of the judgment in *Clifford* v. *Lewis* with that in *Douce* v. Lady *Torrington* will lead to the conclusion that there is neither any incon-

1836.

SHAW v. BORRER.

decided by the same Judge; but, admitting that the introductory words of this will raised by implication a charge upon the real estates for the payment of the testator's debts, and admitting further that there is nothing in the will to rebut that implication, but that all the effect of an express charge must be given to the introductory words, the question is whether such a charge can include a power of sale to the executors. Now all the authorities shew that executors have only power to sell real estate, where such a power is expressly given, or necessarily to be implied from the produce of it being to pass through their hands in the execution of their office. *Barrington* v. *The Attorney-General* (*a*), *Mackintosh* v. *Barber* (*b*) *Bentham* v. *Wiltshire* (*c*), *Patton* v. *Randall* (*d*), *Tylden* v. *Hyde* (*e*), *Milward* v. *Saville* (*g*). Where the estate of a testator is administered by means of a suit in equity, the Court takes care that all proper parties interested in the assets are before the Court; it directs the necessary inquiries to be made, and accounts to be taken in the Master's office, and it never permits the real estate to be applied to the payment of debts unless such an application is expressly directed or sanctioned by the will, until the deficiency of the personal estate is regularly ascertained. But the incidental inquiry in the Master's office as to the state of the testator's assets upon a reference

inconsistency in the two judgments, nor any thing omitted in *Douce* v. Lady *Torrington* (the word "expression" being used in a sense equivalent to "expression indicating an intention"); and that, in *Douce* v. Lady *Torrington* Sir *John Leach* strongly inclined to the opinion, though the case was not decided upon that ground, that the words "with all convenient speed" distinguished the introductory clause of the will in that case from the introductory clause in *Clifford* v. *Lewis*, so as to exclude the implication, which would otherwise have arisen, of an intention to charge the real estate with the payment of debts.

(*a*) *Hard.* 419.
(*b*) 1 *Bing.* 50.
(*c*) 4 *Mad.* 44.
(*d*) 1 *J. & W.* 189.
(*e*) 2 *Sim. & Stu.* 238.
(*g*) *Dyer*, 371. b.

1836.

SHAW v. BORRER.

ence as to title is a proceeding of a totally different character; it wants all the important ingredients which belong to an inquiry in a suit for the administration of assets; it is, in fact, a mere *ex parte* proceeding, and where a title depends upon the question whether a testator's debts and legacies have been paid, it has been decided that the Court will not act upon the Master's report in an *ex parte* proceeding upon a question of so important a nature. *In re Merry* (*a*). *In re De Clifford estates* (*b*).

Mr. *Pemberton* and Mr. *Simpson*, *contrà*.

The words "subject thereto," in the clause directing the trustees to sell the advowson, furnish a complete answer to the objection that the sale cannot take place until a vacancy occurs in the living, and the youngest son is presented. The advowson is to be sold, subject to the right of presentation, at any time when the trustees may think fit to execute the trust. If the youngest son were to refuse to go into orders, the sale, according to the construction contended for on the other side, could never take place.

It is fully established that the introductory words of this will are sufficient to charge the real estate of the testator with the payment of his debts. One of the trustees of the advowson is himself an executor, and the contract for the sale of the advowson was entered into by the trustees at the instance, and with the authority of the other executors. If the sole question here were whether a good title could be made by the trustees alone under the direction given to them by the will to sell the advowson, without any reference to the state of the

(*a*) 1 *Mylne & Keen*, 677. (*b*) 2 *Mylne & Keen*, 624. 820.

1836.

SHAW v. BORRER.

the testator's assets, there can be little doubt that this exception must be over-ruled. But the objection to the joint sale by the trustees and executors, on the ground that the real estate cannot, under the general charge in the will, be applied to the payment of the testator's debts until the deficiency of the personal estate is ascertained by a suit in a court of equity, is neither founded in reason or principle, nor supported by any authority. The deficiency of the testator's assets has, in fact, been proved in the Master's office, and could have been proved by no other evidence, had a suit been instituted for the administration of the testator's estate. The argument on the other side goes the whole length of insisting that wherever there is a charge of debts upon real estate in a will, the estate can never be sold, except through the medium of a suit in equity; a proposition, opposed to every principle of justice and convenience, and contradicted by experience. The fact of the insufficiency of a testator's personal estate to pay his debts was a fact as capable of being proved as the fact of his death or marriage, and it has been proved in the presence of the purchaser; but the argument is, that this fact could only be satisfactorily ascertained in a suit for the administration of the testator's estate, or in a creditor's suit to which the purchaser would not be a party. The objection to the inquiry which has already established the insufficiency of the testator's personal estate in the Master's office on the ground of its being an *ex parte* proceeding is in truth less applicable to that inquiry than it would be to a suit in this Court upon the necessity of which they insist. It is clear, upon the authorities, that where there is a general charge for payment of debts and no devise of the real estate, the executors may sell; and where there is such a general charge and a devise to trustees, the

1836.

SHAW v. BORRER.

the trustees, upon a deficiency of the personal estate being ascertained, are bound to convey the legal estate at the direction of the executors. Where there is a trust to raise so such money as shall supply the deficiency of the personal estate to pay the debts, the purchaser is not bound to ascertain the deficiency, or see to the application of the purchase-money. A distinction has been taken between a trust to sell for this purpose, and a mere power to sell; but it is a distinction which is not founded on reason, and it could never have been contemplated by any testator. Where there is a charge for payment of debts generally, or a charge followed by specific dispositions of real estate, the purchaser is not bound to see to the application of the purchase-money, for the charge is equivalent to a trust, and the same effect will be given to it by a court as if a direct devise had been made to trustees or executors for the same purpose. In the present case the executors, the trustees, and the parties beneficially intrusted concur in the sale of the advowson; the purchaser will, *quâcunque viâ datâ*, get the legal estate, and he is not liable to see either to the deficiency of the testator's assets, or to the application of the purchase-money.

The following authorities were cited: — *Ewer* v. *Corbet* (*a*), *Langley* v. *Lord Oxford* (*b*), *Farr* v. *Newman* (*c*), *Humble* v. *Bill* (*d*), *Lloyd* v. *Baldwin* (*e*), *Doran* v. *Wiltshire* (*g*), *Watkins* v. *Cheek* (*h*), *Green* v. *Belcher* (*i*), *Bonney* v. *Ridgard* (*k*), *Allan* v. *Backhouse*,

(*a*) 2 *P. Wms.* 148.
(*b*) *Ambl.* 717.
(*c*) 4 *T. R.* 621.
(*d*) 2 *Vern.* 444.
(*e*) 1 *Ves.* sen. 173.
(*g*) 3 *Swanst.* 699.
(*h*) 2 *Sim. & Stu.* 199.
(*i*) 1 *Atk.* 505.
(*k*) 1 *Cox*, 145.

1836.

SHAW v. BORRER.

Backhouse (*a*), *Booth* v. *Blundell* (*b*), *Dolton* v. *Hewen* (*c*), *Walker* v. *Smalwood* (*d*), *Omerod* v *Hardman* (*e*), *Jenkins* v. *Hiles* (*g*), *The Earl of Bath* v. *The Earl of Bradford* (*h*), *Shallcross* v. *Finden* (*i*), *Hargrave* v. *Tindal* (*k*), *Barker* v. *The Duke of Devonshire* (*l*), *King* v. *Shrives* (*m*).

Mr. *Tinney*, in reply.

Aug. 5.

The MASTER *of the* ROLLS (after stating the reasons assigned by the Defendant for his first exception):—

Upon the best consideration I have been able to give to the effect of the will, with reference to the two first reasons, it appears to me probable at least, that the testator did not intend the advowson to be sold under the devise to trustees, until they had presented his youngest son to the living, and that the sale was intended to be made subject to the incumbency of the youngest son. The money to arise from the sale was intended for the daughters who should be unmarried at the time when the sale took place, whenever the proper time was. Now, there might be no unmarried daughters at that time: the advowson might consequently fall into the residuary real estate, and become subject to limitations, on which questions of some nicety arise, and which may not give more than a life interest to any person now in *esse*. Under these circumstances, I think that, if there were no title to sell except that of the trustees of the advowson for the purpose of their special

(*a*) 2 *V. & B.* 65.
(*b*) 1 *Mer.* 193.
(*c*) 6 *Mad.* 9.
(*d*) 2 *Amb.* 676.
(*e*) 5 *Ves.* 722.
(*g*) 6 *Ves.* 654. n.
(*h*) 2 *Ves.* sen. 586.
(*i*) 3 *Ves.* 738.
(*k*) 1 *Bro. C. C.* 136. n.
(*l*) 3 *Mer.* 310.
(*m*) 5 *Sim.* 461.

1836.

SHAW v. BORRER.

cial trust, the Court could not properly compel a purchaser to accept the title, and the exception ought to be allowed.

But another title to sell is claimed. It is alleged, — and, for any thing I have heard to the contrary, truly alleged — that the contract was entered into, at the instance of the executors, for the purpose of raising money to pay debts. I do not think it very material that the executors were not parties to the contract personally. One of the vendors was both executor and trustee, and all the other executors are co-plaintiffs with the trustees; and, in this state of things, we are brought to the consideration of a question of great importance. There being a general direction to pay debts, so expressed as to constitute a charge on all the testator's real estates; and there being, in the same will, a devise of a particular portion of the real estate to trustees for a special purpose, and a residuary devise of real estates for other special purposes, and no suit in equity to ascertain the deficiency of the personal estate to pay the debts, can the trustees and executors together make a title to the purchaser of that part of the real estate, which was devised to trustees for special purposes? It is argued that such a sale can only be effected under the decree of a court of equity for the administration of the testator's estate.

Upon the question, whether the purchaser is bound to see to the application of the purchase money, there is some authority. In *Elliot* v. *Merriman* (*a*), *Thomas Smith* died, indebted on bond, having made a will whereby he charged his land with the payment of his debts, and, subject to that charge, he gave his real and personal

(*a*) *Barnard.* 78.

1836.

SHAW v. BORRER.

personal estate to *Goodwin*, who was appointed executor. *Goodwin* sold lands, which were subject to the charge, without paying the debts, and then became bankrupt. Then the creditors of *Smith* filed their bill against the purchaser, and against *Goodwin* and his assignees, to have satisfaction out of the lands which had been sold. The Master of the Rolls dismissed the bill, and thus stated the rule:—

"The general rule is that, if a trust directs that land should be sold for payment of debts generally, the purchaser is not bound to see that the money be rightly applied. If the trust directs that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for payment of those debts. The present case, indeed, does not fall within either of these rules, because here lands are not given to be sold for the payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference, and his Honor was of opinion that it did not. And if such a distinction was to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this court, which would be extremely inconvenient. No instances have been produced, to shew that in any other respect the charging land with the payment of debts differs from the directing them to be sold for such a purpose; and, therefore, there is no reason that a difference should be established in this respect. The only objection that seemed to be of weight with regard to this matter, is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the

1836.
SHAW v. BORRER.

the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far, indeed, it is true, that where lands are charged with the payment of annuities, those lands will be charged in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but, where lands are not burthened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction."

In *Walker* v. *Smallwood* (*a*), *John Smallwood* devised his estates to his son *Thomas* charged with the payment of his debts; *Thomas* devised to his wife *Deborah* charged with the payment of his debts. The creditors of *John* and *Thomas* filed their bill against *Deborah* and a mortgagee of *Thomas*. After the answer had been put in, she and the mortgagee joined in a sale to *Yeomans*, and, on a supplemental bill, the question was whether that sale could stand; and Lord *Camden*, after saying that the creditors have a right to call on the heir or devisee to execute the trust, and, treating it as a rule that where the charge is general the purchaser is not bound to see to the application of the purchase money, expressed himself thus: — "Though a general charge does not make a purchaser before the suit see to the application of the money, yet after a suit commenced I should hold him bound to it."

In *Bonney* v. *Ridgard* (*b*), Lord *Kenyon*, though the case before him involved only leaseholds, expressed strong approbation of the doctrine laid down in *Elliot* v. *Merriman*. And, in discussing an authority cited

(*a*) *Amb.* 676. (*b*) 1 *Cox*, 145.

1836.

SHAW v. BORRER.

cited in *Jenkins* v. *Hiles* (*a*), Lord *Eldon* is reported to have said that if a man, by deed or will, charges or orders an estate to be sold for payment of his debts, and then makes specific dispositions, the purchaser is not bound to see to the application; it is just the same as if the specific bequests were out of the will.

It seems, therefore, clear that a charge of this nature has been and ought to be treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court would, in a suit to which the executors were parties, compel the trustees for special purposes to raise the money requisite for payment of the debts. If so, is there any good reason to doubt, but that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors?

Though the advowson is devised to trustees for special purposes, the testator has, in the first instance, charged all his estates with payment of his debts. The charge affects the equitable but not the legal estate; and, upon the construction, the trusts of the will affect this estate, first, in common with the testator's other property for the payment of debts, and next, separately for the special purposes mentioned in the will.

Possibly, upon the testator's death, it might not be necessary to resort to the real estate at all for the payment of the testator's debts; and, if it should be necessary to resort to the real estate, some part ought in a due administration to be applied in payment of debts before

(*a*) 6 *Ves.* 654.

fore other parts, and it is said that the necessity for raising money to pay the debts out of the real estate, and if such necessity exists, the proper selection of that part of the real estate which ought to be first sold ought to appear, and can only be proved by the Master's report in a suit for the administration of assets. It is true that, if the administration of assets devolves on the Court by the institution of a suit for the purpose, the Court, in the exercise of its jurisdiction, acts with all practicable caution, and proceeds in strict conformity with its established rules. But this is a caution exercised not for the benefit of the creditors or at their instance; for they ask nothing, and have a right to nothing, but payment of their debts; and the question is not, what the Court thinks it right to do for the benefit of the persons who have claims, subject to the debts; but whether the estate, subject to debts by the will, and sold and conveyed by the devises for special purposes at the instance of the executors, would emain in he hands of the purchaser subject to any claims created by or founded ou the will, or whether there is any obligation to see done that which the Court would do in a suit to administer assets.

An argument is deduced from the statutes which have made real estates assets in courts of equity for payment of simple-contract debts; but it does not appear to me that the rule, which the legislature has thought fit to apply in cases where the real estate is not charged with payment of debts, is necessarily to be applied in cases where the testator has charged his real estate with such payment. And on the whole, considering that the charge creates or constitutes a trust for the payment of debts, or, as Lord *Eldon* in one place, adopting the language of Lord *Thurlow*, expressed it, that "a charge is a devise of the estate in substance and

1836.

SHAW
v.
BORRER.

and effect *pro tanto* to pay the debts," and conceiving that the purchaser is not bound either to inquire whether other sufficient property is applicable, or ought to be applied first in payment of debts, or to see to the application of the purchase money, I think that the exception must be over ruled.

Exception overruled.

The second exception, which related to the time at which a good title was shown, was abandoned.

March 9.

RIPLEY *v.* MOYSEY.

The general personal estate of a testator is liable to all costs occasioned by his mistake, or rendered necessary for the purpose of obtaining the opinion of the Court on the construction of his will, though some of those costs may have been incurred in proceedings affecting the real estate only, and the result of which was to benefit a devisee of the real estate.

THE testator devised a real estate, subject to the payment of a corn-rent, for a charitable purpose to *Christopher Wilson*. It appeared, by the Master's report, that the Christian name of the person, to whom the testatrix intended to give the estate, was *James* instead of *Christopher*.

Mr. *Beames* and Mr. *Simons*, for the residuary legatee, submitted that the costs of the inquiry as to the identity of *James Wilson*, and the costs of making the Attorney-General a party, for the purpose of having the charge of the corn-rent declared void under the Mortmain Act, ought to be borne by the devisee, for whose benefit the inquiry was made, and who, by the result of the suit to which the Attorney-General was a necessary party, had acquired the estate exonerated from the charge.

Mr. *Kindersley, contrà.*

The

The MASTER *of the* ROLLS.

1837.

RIPLEY *v.* MOYSEY.

The inquiry was rendered necessary by this mistake of the testatrix, and the residuary legatee is only entitled to the residue of the personal estate, after payment of all costs and charges occasioned by the will.

BOOTH *v.* LEYCESTER.

Feb. 23.

An injunction was granted to restrain the Plaintiff from prosecuting a suit not brought to a hearing in Ireland, the subject matter of the suit being the same as that of a suit instituted in this Court, and in which this Court had pronounced a decree, refusing the relief sought by the Plaintiff.

A PETITION was presented in this cause by the Defendants, praying that the Plaintiff *Booth* might be restrained from proceeding in a suit which he had instituted in the Court of Chancery in *Ireland*, as the assignee of certain annuities granted by the late Sir *John Roger Palmer* (to which the *English* and *Irish* estates of Sir *J. R. Palmer* were alleged to be subject), for the purpose of recovering the arrears of those annuities. The *Irish* suit had not been brought to a hearing, and the ground upon which the injunction was sought, was, that the subject-matter of the suit was exactly the same as that of the cause in which this petition was presented, and in which a decree had been pronounced by this Court against the claim of the Plaintiff (*a*).

Mr. *Spence* and Mr. *Tinney*, in support of the petition, cited *Harrison* v. *Gurney* (*b*), *Clarke* v. *The Earl of Ormonde* (*c*), and *Lord Portarlington* v. *Soulby* (*d*).

Mr. *Pemberton* and Mr. *Kindersley*, *contrà*, admitted that the subject-matter of the two suits and the relief sought were the same, and that an application might properly

(*a*) *suprà*, p. 247.
(*b*) 2 *J. & W.* 563.
(*c*) *Jac.* 546.
(*d*) 3 *Mylne & Keen*, 104.

1837.
BOOTH
v.
LEYCESTER.

properly have been made in *Ireland* for staying the proceedings in the *Irish* cause, on the ground that the subject of the suit was *res judicata* in this Court. Such an application could not, upon the authorities — and there had been some very recent decisions upon the point — have been refused by the Court of Chancery in *Ireland.* But they submitted that, in this cause, the application could not be granted, because the Court had no jurisdiction to interfere with the proceedings of a foreign court. Even if the Court had jurisdiction, the Defendants had no equitable right to call upon the Court for its interposition, inasmuch as both the *English* and *Irish* suits had been instituted so long ago as the year 1833, and they had never taken any steps to stop the *Irish* suit.

The MASTER *of the* ROLLS.

It has been justly observed at the bar that, if an application had been made to the Court of Chancery in *Ireland* to stay the proceedings in the suit pending in that Court, on the ground that the subject-matter of it was *res judicata* in a Court of competent jurisdiction in this country, the authorities upon this point would probably have induced that Court to accede to the application. The question is, whether, with these authorities before me, I ought to put the parties to go to *Ireland,* in order to obtain an order which this Court has, undoubtedly, jurisdiction to make at once. As it appears that these suits were instituted for the same matter in all respects, and there has been an adjudication upon that matter, from which there may, indeed, be an appeal, but which, for the present, must be considered as final, I think I should not be performing my duty, if I permitted the Plaintiff to go on with the proceedings in *Ireland.* The injunction prayed by this petition must, therefore, be granted.

1837.

HOWARD *v.* RHODES.

March 18.

The Court will not allow costs to a trustee who, after having acted, declines to perform the trusts reposed in him, and thereby renders a suit for the appointment of a new trustee necessary.

THE bill was filed by the several parties interested under a will (some of whom were infants), against the four Defendants named executors and trustees in the will, for the purpose of having a new trustee appointed in the room of the Defendant *Charles Lane*, who was desirous of being discharged from the trusts reposed in him by the will, there being no power contained in the will for appointing new trustees. The Defendants had all proved the will and acted in the trusts thereof.

The Defendant *Charles Lane*, by his answer, admitted that he was desirous of being discharged from the trusts reposed in him by the testator's will upon being properly released and indemnified in respect thereof.

Mr. *Lloyd*, for the Plaintiffs, asked for the usual reference to the Master to approve of a new trustee.

Mr. *Sharpe*, for the continuing trustees.

Mr. *Lane*, for the retiring trustee, asked for the costs of that Defendant and certain extra expenses which had been incurred by him in respect of this suit.

The MASTER *of the* ROLLS said the Defendant, in his answer, assigned no reason for his retirement, and that no costs could be allowed to a trustee so declining to perform the trusts reposed in him.

Mr. *Lane* submitted that no costs were asked against the retiring trustee by the Plaintiffs.

The

1837.

HOWARD v. RHODES.

The MASTER *of the* ROLLS said it was the duty of the Court to protect the estate against being burthened with the costs of a trustee who had declined, without any cause assigned, to perform the trusts reposed in him, and had thereby rendered this suit unnecessary.

The usual reference was directed, and no order made as to costs.

April 29.

MARR *v.* WILLIAMS.

Where the Defendant had presented a petition to the Lord Chancellor to have a demurrer set down to be heard before the Vice-Chancellor, and before the order was obtained upon it, the Plaintiff, who knew of the application made by the Defendant, presented a petition to the Master of the Rolls to have the demurrer heard in this court, and obtained an order upon that petition, the Plaintiff was held to be entitled to his order.

MR. *TEED* moved, on behalf of the Defendant, to discharge an order obtained by the Plaintiff, under the following circumstances. The bill was filed for the specific performance of an agreement, and the Defendant filed a general demurrer for want of equity on *Saturday*, the 23d of *April*. On *Monday*, the 25th, the Defendant's solicitor presented a petition to the Lord Chancellor at the secretary's office, to have the demurrer set down for hearing before the Vice-Chancellor. According to the course of that office, petitions are not answered until the day after they are presented. On the same 25th of *April*, the Plaintiff, having notice of the application made to the Lord Chancellor, presented a petition to the Master of the Rolls, for an order to set down the demurrer to be heard before his Lordship, and that order, by the course at the office of the secretary of petitions to the Master of the Rolls, was drawn up immediately and served, on the same day, on the Defendant's clerk in court. The order for setting down the demurrer before the Vice-Chancellor was not drawn up till the following day. Under these circumstances he submitted

submitted that, as the Plaintiff had notice of the application made to the Lord Chancellor, the order for setting down the demurrer to be heard in this Court had been irregularly obtained.

1837.
MARR
v.
WILLIAMS.

Mr. *Pemberton*, *contrà*, said that notice had nothing to do with this question, for a mere petition for an order, before any order had been obtained upon it, was a nullity which the Court could not take into its consideration. Each party had a right to set down the demurrer to be heard, and, the Plaintiff, having first obtained and served his order, was entitled to have the demurrer heard in the Court which he had thought proper to choose.

The MASTER *of the* ROLLS said this was evidently a contest between the solicitors of the parties with a view to the retainer of particular counsel; but, however inconvenient such a course might be, he had no authority to deprive the Plaintiff of the order which he had obtained in priority to the Defendant.

SIMPSON *v.* LORD HOWDEN.

March 1. 3.

THE bill was filed by Sir *John Simpson*, knight, the Right Honourable *James Meek*, lord mayor of the city of *York*, *George Hudson* and *Thomas Backhouse*

By an agreement between Lord *H.*, a peer of parliament, and proprietors of shares in a projected railway, it was stipulated on the one hand that Lord *H.* should withdraw his opposition to a bill in parliament for establishing the railway according to a certain line, and on the other hand, that the proprietors, on the bill passing, should pay certain sums to Lord *H.* by way of compensation for the injury his land would sustain, and use their best endeavours to procure a deviation from the original line in the next session of parliament.

After the bill for establishing the railway had passed, the proprietors filed a bill to have the agreement delivered up to be cancelled, as being contrary to public policy, and therefore void. A general demurrer for want of equity to the bill was over-ruled. *Semble*, that such an agreement is contrary to public policy and illegal.

1837.

SIMPSON v. LORD HOWDEN.

house against *John Francis*, Lord *Howden*, and it prayed that it might be declared that the agreement between the Defendant and the Plaintiffs in the bill mentioned was void, and that it might be delivered up to the Plaintiffs to be cancelled, and that the Defendant might be restrained by injunction from proceeding in an action commenced by him upon the said agreement for enforcing the payment of the sum of 5000*l.*; and, if it should appear to the Court that the agreement was not void in law, then that it might be declared that, according to the true intent of the parties thereto, the sum of 5000*l.* did not become payable by the Plaintiffs to the Defendant except under the circumstances and upon the condition therein mentioned.

The bill stated that in the year 1835 a company was formed under the name of "The *York* and *North Midland Railway Company*," for making a railway from the city of *York* to and into the township of *Altofts* in the parish of *Normanton* in the county of *York*; and that a great number of persons subscribed for and became proprietors of shares in the said Company, and that at the time of entering into the agreement in question, the Plaintiffs were subscribers for and proprietors of a considerable number of such shares. That preparations were made during the year 1835 for applying to parliament for an act to incorporate the Company, and to give them compulsory powers to purchase lands, and other powers necessary for making and completing the railway; and that, in compliance with the parliamentary regulations in that behalf, the line of the intended railway had been surveyed, and the maps or plans of the line deposited in the respective offices of the clerks of the peace of the several districts through which the intended line was to pass.

The

1837.

SIMPSON v. LORD HOWDEN.

The bill then stated that the Right Honourable *John Francis* Lord *Howden*, a peer of the Upper House of Parliament, was the proprietor of lands through a portion of which the line of the intended railway was described as passing; that, when the proposed line became known to Lord *Howden*, he in the first instance made no objection to it, but only stipulated that it should be made to pass at as great a distance as possible from his house and lands, and that such stipulation was complied with; but that afterwards, without any cause assigned, he expressed himself to be opposed to the line of the said railway, and required that it should be entirely withdrawn from his lands, but that such opposition was expressed by him at too late a period to enable the Company to survey a new line, and prepare and deposit the necessary plans and maps within the time requisite for obtaining an act of parliament in the then ensuing session.

The bill farther stated that, upon the bill for incorporating the Company being introduced, Lord *Howden* presented a petition to the Commons House of Parliament, wherein he complained that the said line of railway was injudiciously chosen and unnecessarily injurious to his estate; and the Company having reason to fear that, from his personal influence in the Upper House of Parliament, his opposition there would endanger the passing of the bill, were induced to enter into a treaty with him for putting an end to such opposition.

The bill then stated that the Plaintiffs, as proprietors of shares in the said Company, became parties to and signed a memorandum of agreement, dated the 4th of May 1836, and made between Lord *Howden* of the one part and the Plaintiffs of the other part, whereby after reciting, among other things, that a bill had been introduced

1837.

SIMPSON v. LORD HOWDEN.

troduced into parliament for making the railway intended by the Company, and that the line thereof, according to such bill, and the maps or plans deposited for the purposes thereof, would, to a considerable extent, pass through the estates of Lord *Howden*, and that, as Lord *Howden* considered the same would be a great injury and detriment to his estates, he was therefore a dissentient from such undertaking, and would oppose the passing of the bill; and also reciting that the Plaintiffs, in their individual capacities, and not merely as proprietors of the said projected railway, had proposed to Lord *Howden*, that, if he would withdraw his opposition to the bill, and assent to the said railway, they would endeavour to deviate the line proposed in the map or plan deposited for the purposes of the bill, and would endeavour to carry such deviated line in the direction shewn in the map or plan annexed to the agreement, and furthermore that, in case the bill then in parliament for making such railway should pass into a law in the then session of parliament, the Plaintiffs should be bound by the stipulations and agreements thereinafter contained; it was witnessed, and Lord *Howden* thereby agreed that, in consideration of the stipulations and agreements thereinafter contained being observed and performed, he did thereby withdraw his opposition to the bill, and give his assent thereto; and the Plaintiffs thereby agreed, that they would apply during the then next session of parliament, and use their best endeavours to obtain an act to enable them to deviate their line as proposed in the plan drawn in the margin of the agreement, and furthermore, that in case the bill then in parliament for making the said railway should be passed into a law within the then session, the Plaintiffs, or some or one of them, their or his respective heirs, executors, or administrators, some or one of them, or the said Company, should within six calendar months after the act then before parliament should have

1837.

SIMPSON v. LORD HOWDEN.

have received the royal assent, pay to Lord *Howden*, his executors, administrators, or assigns, and as parts of his personal estate, the sum of 5000*l.*, as and towards compensation for the damage and detriment which the residence and estates of Lord *Howden* would sustain from the said railway passing according to such deviated line, and exclusive of and without prejudice to the further compensation to be made to him Lord *Howden*, his heirs, or assigns, in the event of the said deviated line not being ultimately adopted; and without prejudice to such further compensation for any such injury and damage as thereinafter expressed. And further that, in case the bill then in parliament should, within the then present session, be passed, for making the railway according to the present parliamentary plan, then the Plaintiffs, or some or one of them or the Company, should in the next session of parliament, apply and use their best endeavours for obtaining an amended act for deviating the line of the railway as proposed in the plan drawn in the margin of the agreement; and in case the Plaintiffs, or some, &c. should not obtain such an amended act, by reason of a dissolution of parliament, or other inevitable obstacle, or, in that case, during the session of parliament then next following, then the Plaintiffs, or some, &c. should within three calendar months after the amended act should have passed, or after the failure to obtain such amended act, pay to Lord *Howden*, his executors, &c., such additional sum of money over and above the sum of 5000*l.* by way of compensation, as should be fixed by such reference or umpirage as thereinafter mentioned, exclusive of and without prejudice to such further compensation as thereinafter expressed; and also that the Plaintiffs, or some or one of them, their or his heirs, &c., or the said Company, should previously to using any part of the lands of Lord *Howden*, his heirs or assigns, pay to him or them the

1837.

SIMPSON v. LORD HOWDEN.

sum of 100*l.* for every acre of such lands so used for the purposes of the railway. And it was further agreed, that such further damage and detriment as should be sustained by Lord *Howden*, by the railway passing otherwise than according to the proposed deviated line, should be fixed and determined by arbitrators in the manner therein mentioned.

The bill proceeded to state, that after the said agreement had been entered into, Lord *Howden* withdrew his opposition to the bill, and the same passed both Houses of Parliament, and on the 21st of *June* 1836, received the royal assent; and the persons therein named were incorporated by the name of "*The York and North Midland Railway Company.*" That the line of the railway, authorised by the act, was the original line described in the maps or plans, which had been deposited in the offices of the clerks of the peace for the purpose of the said act, without any deviation therefrom; but that, after the passing of the said act, and before the company had entered upon or taken possession of any part of the lands of Lord *Howden*, a new and more direct line of railway, by which nearly three quarters of a mile in distance would be saved, was recommended to them by their engineer, and they resolved to adopt the same as preferable to any other line; and a petition for leave to introduce a bill to enable the company to adopt such new line, in lieu of the deviated line mentioned and referred to in the agreement, had been presented to Parliament; and that, by the adoption of such new line in the construction of the railway, they would altogether avoid the lands of Lord *Howden*, no part whereof would be required or used by the company, and no such damage or detriment, therefore, would be sustained by any of the lands of Lord

Lord *Howden*, as was contemplated at the time when the said agreement was entered into.

The bill further stated, that the Plaintiffs had been advised that the said agreement was against public policy, and that no demand could be sustained by either of the parties thereto against the other in respect thereof. And further, that if the agreement had been legal, it was not the intention of the parties thereto that Lord *Howden* should be entitled to call upon the Plaintiffs for the payment of the sum of 5000*l.*, by the agreement stipulated to be paid as a compensation for the damage or detriment which it was then supposed his lands would sustain from the passing of the line of railway through them, unless and until it should appear, that some damage or detriment would by that means be sustained.

The bill then stated that Lord *Howden* had, nevertheless, commenced and was prosecuting an action against the Plaintiffs for the recovery of the said sum of 5000*l.*, and prayed an injunction as above mentioned.

To this bill the Defendant put in a general demurrer for want of equity.

Mr. *Treslove*, Mr. *Koe*, and Mr. *Bethell*, in support of the demurrer.

It is clear, upon the authorities, that the withdrawing of opposition to a bill in Parliament is a good consideration for an agreement. The point was expressly raised in *The Vauxhall Bridge Company* v. *Earl Spencer* (*a*). In that case the proprietors of *Battersea Bridge*

(*a*) 2 *Mad.* 356., and *Jac.* 64.

1837.

SIMPSON v. LORD HOWDEN.

Bridge declared their intention of opposing the bill for the intended building of *Vauxhall Bridge*, unless a sum of money was paid or secured to them as an inducement to withdraw their opposition, and a bond was in fact given by certain members of the committee of subscribers to the intended *Vauxhall Bridge* to the proprietors of *Battersea Bridge* to secure to them the payment of the sum of 5000*l.*, when the intended bridge should become passable, the same to be paid to certain trustees on a given day, and to be laid out by them in the purchase of stock, to accumulate until the bridge should be built. A deed of covenant and declaration of trust was executed, and the sum of 5000*l.* invested, in pursuance of the agreement. There, as here, the *Vauxhall Bridge* Company filed their bill to be relieved from the agreement, insisting that it was a fraud upon the legislature, and contrary to public policy. To that bill a general demurrer was put in, which was overruled by Sir *Thomas Plumer*, who inclined to the opinion that the agreement was contrary to public policy and illegal. When the cause came to be heard, it was decreed that the bill should be retained for a year, and that an action should be brought by the obligees in the bond, which the Plaintiffs in equity were to be at liberty to defend. From that decree the Plaintiffs appealed, and, upon the appeal, Lord *Eldon*, though he did not vary the decree, because the matter was as capable of being tried at law as in a court of equity, expressed a clear opinion that there was nothing illegal in the agreement, and that a party likely to be prejudiced by the passing of a private bill in parliament might lawfully take a sum of money, or a security for a sum of money, in consideration of his withdrawing his opposition to the bill. The late case of *Edwards* v. *The Grand Junction Railway Company* (*a*), is an authority to

(*a*) 1 *Mylne & Craig*, 650.

1837.

SIMPSON v. LORD HOWDEN.

to the same effect, the Lord Chancellor having in that case referred to the case of the *Vauxhall Bridge Company* v. *Earl Spencer*, and observed that Lord *Eldon*'s opinion was a strong authority in favour of the proposition that the withdrawing opposition to a bill in parliament might be a good consideration for a contract. In a more recent case Lord *Petre* agreed with the *Essex* Railway Company to withhold his opposition to the bill for establishing the railway in consideration of a sum of money for the injury which his land would sustain by the project. The company afterwards, considering the agreement which they had entered into with Lord *Petre* unreasonable, summoned a jury, according to the regulations of the act, for assessing the damage actually sustained. Lord *Petre* filed a bill for specific performance of the agreement and an injunction. An *ex parte* injunction was granted by the Lord Chancellor, all the circumstances of the case having been fully brought before him; and no attempt has been since made to dissolve it. Another ground upon which the demurrer to the present bill ought to be allowed is, that there is no pretence for withdrawing the case from the decision of a court of law, which is perfectly competent to decide the question, whether the agreement is or is not against public policy. Lord *Howden* might, if he were so advised, demur to the plea of the Defendant at law, so as to put that question in issue, and have it decided by the Judges sitting in *banc*. The bill in effect calls upon this Court to determine that it is not competent to a court of law to decide upon the validity of this agreement. The Company, having succeeded in obtaining the sanction of parliament to the existing project, may not apply for a variation of the line of road in pursuance of the agreement; or, if they do apply, they may not succeed in inducing parliament to consent to the proposed alteration in the line of road. In either of these cases Lord *Howden*

1837.

SIMPSON v. LORD HOWDEN.

den will be entitled to the compensation secured by the agreement; and it is, therefore, against all conscience and equity to call for the delivery up of the agreement to be cancelled.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Wilbraham*, *contrà*.

The grounds upon which the bill seeks to have this agreement delivered up to be cancelled, are, first, that it is a void agreement, because contrary to public policy; secondly, that the consideration for the agreement has failed, or is likely to fail; thirdly, that the construction put upon the agreement by Lord *Howden* is harsh, unconscionable, and contrary to the intention of the parties when they entered into it; fourthly, that it is extremely doubtful whether a court of law can advert to those circumstances which it is competent to a court of equity to take into its consideration, in order to do justice between the parties; and, lastly, that, even if a court of law can enter into those considerations, a court of equity has concurrent jurisdiction to examine into, and decide upon the validity of the agreement, and can moreover order the agreement to be delivered up to be cancelled.

The first question is one of great public importance, and is wholly unaffected by decision, for the ground, upon which this agreement is impeached as illegal, because contrary to public policy, is wholly distinct from that on which the validity of the agreement was questioned in the case of *The Vauxhall Bridge Company* v. *Earl Spencer*. First, we say that the agreement is a fraud upon the landowners, through whose lands the railway is to pass; secondly, it is a fraud upon the legislature, inasmuch as it is an agreement to procure the sanction of Parliament to

1837.

SIMPSON v. LORD HOWDEN.

to a line of road which it was not intended to adopt; thirdly, the agreement is illegal, because Lord *Howden* being a peer of parliament and possessing in that character great influence, is bound to use it for the public interest, and cannot legally place himself in a situation in which his private interest is inconsistent with the proper exercise of his public duties. The agreement in the case of *The Vauxhall Bridge Company* v. *Earl Spencer* was an agreement between an established company and the proprietors of a rival undertaking which was not established, by which the former consented to withdraw their opposition on certain terms. In that agreement, all the persons interested in the *Battersea Bridge* concern were represented by the *Battersea Bridge* company, and were, consequently, substantial parties to the transaction; it differed entirely, therefore, from the agreement between Lord *Howden* and the Plaintiffs, in which a single landowner contracts for a private advantage behind the backs of all the other landowners interested in the transaction. As between the parties to the agreement in that case there was no concealment; but it was a very important question in the cause whether the transaction had or had not been concealed from the legislature, and the action at law seems to have been directed to try that question, though this does not distinctly appear in the report. Lord *Eldon* was of opinion that the legality of the agreement might well have been determined in a court of equity, but, as a court of law had concurrent jurisdiction, he did not think fit, or see any occasion, to vary the decree. There is nothing in Lord *Eldon*'s judgment to warrant the conclusion that in no case would a secret agreement to withdraw opposition to a bill in parliament be a fraud upon the legislature. In *Edwards* v. *The Grand Junction Railway Company*, the question whether the agreement was a fraud upon the legislature did not arise.

Can

1837.

SIMPSON *v.* LORD HOWDEN.

Can any thing be more contrary to justice and public policy, or a grosser fraud upon the provisions in acts of this description by which the great body of landowners through whose lands the projected railway is to pass are intended to be protected, than that a single proprietor of great wealth and influence, or half a dozen such proprietors, shall give their support in parliament to a measure which must work great private inconvenience to many of the landowners, on the score of its being highly beneficial to the public, while at the same time they have entered into a secret agreement with the proprietors, by which they have secured to themselves a large pecuniary emolument in consideration of withdrawing their opposition to the measure? If there is any wisdom or policy in that part of the law which declares that, if a debtor enter into a composition with his creditors, no creditor shall accept a private security or particular advantage in preference to the rest, is not the principle upon which that law is founded precisely applicable to the present case? The private advantage, which Lord *Howden* seeks to derive from the stipulations contained in this agreement, is unjust to all the other landowners, and wholly inconsistent with the clauses in the act of parliament, providing the mode in which the damage to each landowner shall be ascertained.

The agreement is not only a fraud upon the landowners, but it is a fraud upon the legislature and upon the public. In this point of view the way in which railway acts are commonly obtained cannot be too strongly censured. The proprietors obtain the sanction of the legislature to a line of railway which is never intended to be adopted; and they come, next session, with all the weight and influence which their incorporated character and the authority of an act of parliament

1837.

SIMPSON v. LORD HOWDEN.

ment gives them, to bear down upon the private interests of landowners, and to procure a totally different line of railway, which different line was the line really contemplated in the first instance, but which, had it been fairly and *bonâ fide* submitted to the legislature, would have met with the strongest opposition, and in all probability never have been sanctioned by parliament. Is it not a gross mockery of the legislature and the public, that parties should go before parliament holding out a particular line of railway as so superior to all others, and so advantageous to the public as to justify an interference with the private rights of property, while at the same time they have entered into a secret agreement, by which they have bound themselves to use all their exertions in the next session of parliament to procure a deviation from that line? Will this Court sanction an agreement by which the legislature has been thus deceived and defrauded? Above all, will a court of equity sanction such an agreement, where the party entering into it is a peer of parliament, bound by his honour and his oath to give his best consideration to measures submitted to parliament, and to vote for those measures upon public grounds? Can a legislator, bound by those sacred obligations, lawfully place himself in a situation which sets his private interests at variance with his public duties, and renders it impossible for him to decide upon questions affecting the interests of the community with an impartial and unbiassed mind?

The next ground upon which this agreement ought to be cancelled is, that the consideration for it has failed, or in all probability will fail, for a line of railway has been pointed out to the company, which, if its adoption should be sanctioned, will enable them entirely to avoid Lord *Howden*'s lands, and in that case it would be unjust and oppressive to insist upon the

1837.

SIMPSON v. LORD HOWDEN.

the payment to Lord *Howden* of the sum of 5000*l.*, on the mere ground that there is no express stipulation in the agreement for the event of the company being enabled to avoid Lord *Howden*'s land altogether. It is doubtful whether a court of law could enter into the consideration of the question whether the consideration for it had failed, or was likely to fail. The construction, insisted upon by the Defendant, is plainly inconsistent with the intention of the parties to the agreement, and could never be put upon it in a court of equity.

Mr. *Treslove*, in reply.

March 5. *The* MASTER *of the* ROLLS (after stating the substance of the bill),

In support of the demurrer, it is argued that the agreement is fair and legal; that the withdrawing of an opposition, to an act of parliament of this sort is a good consideration for it; and that, during the solicitation for an act to authorise one line of railway, there was nothing against public policy in a public agreement to promote that line, at the same time that it was privately stipulated that the same parties should use their best endeavours to obtain an act for an altered line in the next session of parliament. And further, it is argued that, if there were a doubt as to the agreement being illegal, and against public policy, the question would be proper to be tried in a court of law, and ought not to be withdrawn from the proper jurisdiction. It is further argued, that it does not yet appear, whether the authority of parliament can be obtained for any varied line of road, and consequently that the company may be compelled to pursue the line sanctioned by the present act, and Lord *Howden*'s land may accordingly be taken and used for

for the purposes of the railway; in which event he will, in any view of the case, be entitled to compensation under the agreement, which, therefore, ought not to be delivered up to be cancelled.

As a court of law has not the authority, which this Court has, to order an illegal agreement to be delivered up to be cancelled; and as this Court has a jurisdiction, which is constantly acted upon and never doubted, to decide upon a legal question involved in the title to the equitable relief which is sought, and as the Court, in cases of any doubt or difficulty, has the means either of obtaining the assistance of a court of law, or of putting the matter in a course of trial, according to the forms and under the directions of the Judges of a court of common law, it is obvious that I cannot allow this demurrer upon the argument that this is an attempt to change the jurisdiction.

I must consider the legal question with reference to the prayer for relief which asks that the agreement may be delivered up to be cancelled, and in the consideration of such a question I need not regard the fact that the Plaintiffs are partakers of the illegality, if illegality there be, with the Defendant; because, in such cases depending upon public policy, the Court does not give relief for the sake of the party who is complaining, but for the sake of the public, and to avoid public injury.

The Plaintiffs allege that the agreement is illegal, and against public policy on three grounds:—

First, they say that it was a fraud on the other landowners through whose grounds the line of railway was intended to pass.

Secondly, that it was a fraud on the legislature by procuring an act of parliament on a representation that one line of railway was the best, and intended to be pursued,

1837.

SIMPSON v. LORD HOWDEN.

pursued, but which, in fact, was not intended to be adopted.

Thirdly, that it was an illegal act in Lord *Howden*, who, as a member of parliament, had no right to make an agreement, which necessarily placed his private interest in conflict with his duty as a legislator. It is said, and truly said, that every member of the legislature ought to preserve his judgment free, unbiassed, and disinterested for the performance of his legislative duties; and it is argued that it is illegal to enter into an agreement which gives him a direct and immediate interest in the very subject with reference to which that duty is to be performed.

I do not think it necessary for me to determine on the present occasion whether this agreement can properly be considered as a fraud on the landowners through whose grounds the line of railway was to pass, or how far the character of the Defendant, as a member of parliament, precludes him from any right which persons not invested with that character may have to enter into such an agreement. It has been held that the withdrawing opposition to a bill in parliament may be a good consideration for a contract, and it certainly may be so in cases where the provisions of the act are consistent with, and not intended to be thwarted by the provisions of the agreement; but it by no means follows that it should be so in this case. I do not, however, enter particularly into that question, because it appears to me that the second of the grounds alleged by the Plaintiffs for considering this agreement invalid is sufficient to enable me to decide on this demurrer.

Acts of parliament, like the one which was obtained in this case, are laws by which private rights are to some, and often to a great extent sacrificed for the sake of something, which by the promoters is alleged, and, as we must

1837.

SIMPSON v. LORD HOWDEN.

must presume, by the legislature is supposed to be a general and public benefit. The land which a man considers to be his own, and which it is most important for the interest of the community that he should be able to rely upon as being absolutely his own, is taken from him against his will; and against his will, he is compelled to accept a sum of money in lieu of it. This is done, on the notion of a great and predominating public interest outweighing the private interests concerned. And the legislature judges of the private interests affected, and of the general and public benefit proposed to be obtained, by the particular plan or scheme which is offered and by hearing all persons whose private interests are concerned, or are conceived to be in opposition to the scheme. It is obvious that the legislature can only come to a right conclusion by knowing correctly what is the plan proposed, and who are the persons whose property is affected; for this purpose the notices are to be given; the maps or plans to be deposited; and the parties are to be heard.

In the present case Lord *Howden*, having opposed the bill, entered into an agreement to withdraw his opposition; by the consent which he then gave, he must be considered to have concurred with the promoters of the bill in representing the line of road delineated on the plan duly deposited, as the line which was to be adopted and acted upon. This representation had its effect on the minds of all persons interested, who had no opportunity of contemplating or considering any other line of road. They addressed themselves to this line only; their opposition or consent regarded this line only; the legislature proceeded and determined upon it. And in the mean time, whilst all other persons were contemplating this line alone, the promoters of the bill, with the sanction and concurrence of Lord *Howden*, and, for his benefit, contracted to use their best endeavours in a future session of parliament to procure another bill to vary that

1837.

SIMPSON v. LORD HOWDEN.

that line of road in reference to which, and upon the faith of which, all other parties were proceeding. In effect, the promoters of the bill and Lord *Howden* prevailed upon the legislature to incorporate the Company, and to sanction a line of way in respect of which it was at that time intended to make, if they could, a considerable deviation; and the Company having gained the incorporation, and having the authority of the legislature to commence their operations, were, with that advantage, to use their best endeavours to procure another act for the varied line. I do not think it probable that the bill would have been passed into a law, if it had been known that the promoters of the bill had entered into this agreement with Lord *Howden*. It is true, as was argued, that the Company, although they agreed, were not actually compelled to apply, and they might not succeed in their application for the varied line; but, looking at the conduct of the parties; at that which they stipulated to do, and at the effect and consequences of such conduct and stipulations to the legislature and the public, I see very strong reasons to think that, when the proper time comes for deciding upon the question, this contract may be considered and held to be illegal. Now I could not decide in favour of the demurrer without entertaining a clear opinion that the contract was valid; and as I think it, on the contrary, very probable that the contract will prove to be invalid, I am of opinion that, on that ground, the demurrer must be overruled.

BULLIN *v.* FLETCHER.

THE decision in this case (*supra*, p. 369.) was appealed from, and affirmed by the Lord Chancellor on the 14th of *April*.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

1836.

RAFFETY *v.* KING.

1836.
Nov. 23.
Dec. 5.

If the mortgagee enters into possession in his character of mortgagee, or by virtue of his mortgage title alone, he is for the period of twenty years liable to account, and, if payment be tendered to him, liable to become trustee for the mortgagor; but, if the mortgagor permits the mortgagee to hold for twenty years without accounting, or admitting his mortgage title, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it was previously at law; and, in such a case, the time runs against the mortgagor from the moment the mortgagee takes possession, and continues to runs against all those claiming under the mortgagor, whatever may be the disabilities to which they may be subjected.

JOHN DEAN, being entitled to a piece of land called *Paradise Mead*, subject to a mortgage term for 1000 years, vested in *Samuel Manning*, for securing the

But if the mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and the validity of the conveyance he takes, and if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mortgagor and mortgagee, to keep down the interest of the mortgage for the benefit of the person or persons entitled in remainder, and time will not run against the remaindermen during the continuance of the estate for life.

Where a mere formal party, having no interest in the suit, was joined as a co-Plaintiff with the parties having a beneficial interest, it was held, that an objection, not raised by the answer, on the ground of misjoinder, could not prevail at the hearing.

1836.

RAFFETY v. KING.

the sum of 200*l.* and interest, made his will, dated the 26th of *March* 1795, and thereby devised the piece of land to his wife *Mary*, to hold the same for and during the term of her natural life, if she should so long continue a widow and unmarried. The testator also gave her certain copyhold property to be held in like manner, and, from and immediately after her death or intermarriage, he devised the said freehold land and other property to *Vesey Raffety* and his heirs, in trust to sell and dispose thereof by public sale for the best price that could be gotten for the same, and as soon after the death or intermarriage of *Mary Dean* as conveniently might be, and place out the money, arising by the sale, at interest on government or real securities as he might think best; his receipts alone to be good discharges for the purchasers; and upon trust to pay and apply the money arising from the sale among the testator's children named in the will, as they should respectively attain the age of twenty-one years. The testator gave his personal estate, after payment of his debts, to his wife, and he appointed *Vesey Raffety* trustee, and his wife *Mary* sole executrix of his will.

The testator died shortly after the date of his will, leaving his wife, and the seven children named in the will, surviving him; and his will was duly proved by *Mary Dean*, the widow.

By indentures of lease and release, dated the 8th and 9th of *April* 1796, and made between *Vesey Raffety* of the first part, *Mary Dean* of the second part, *Samuel Manning* of the third part, and *John Manning* of the fourth part, after reciting, amongst other things, the will of *John Dean*, but omitting to state the appointment of *Mary Dean* as executrix, and reciting that, upon an account stated between *Samuel Manning* and *Vesey Raffety*,

Raffety, the sum of 229*l.* 3*s.* 4*d.* appeared to be due to *Samuel Manning* on his security, and that *Samuel Manning* had agreed with *Vesey Raffety* and *Mary Dean* for the absolute purchase of the piece of freehold land called *Paradise Mead*, for the price of 300*l.*, out of which the mortgage debt was to be retained, it was witnessed that, in consideration of the mortgage debt of 229*l.* 3*s.* 4*d.* due to *Samuel Manning*, and of the further sum of 70*l.* 16*s.* 8*d.* paid by *Samuel Manning* to *Vesey Raffety* and *Mary Dean*, or one of them, they, the said *Vesey Raffety* and *Mary Dean*, conveyed the said piece of freehold land to *Samuel Manning*, his heirs and assigns, for ever. And the deed contained covenants by *Vesey Raffety* and *Mary Dean* for quiet enjoyment, and for further assurance; and, at the request of *Raffety*, the residue of the mortgage term of 1000 years was assigned by *Samuel Manning* to *John Manning*, in trust for *Samuel Manning*, his heirs and assigns, and to attend the inheritance.

Upon the execution of this deed, *Samuel Manning* entered upon the land, and he, and the persons claiming under him continued in possession, without accounting, or being ever called upon to account for the rents and profits, up to the time when this suit was instituted.

Mary Dean died, without having married again, in the month of *December* 1832.

Vesey Raffety died, leaving the Plaintiff, *John Raffety*, his heir-at-law, and the bill was filed by the surviving children of the testator, *John Dean*, and the representatives of such of them as were deceased, together with *John Raffety*, against the parties claiming under *Samuel Manning*, and it prayed that the estate might be reconveyed to the Plaintiffs on the trusts of the will, dis-

1836.

RAFFETY v. KING.

charged from the mortgage; or, if the Court should be of opinion that the mortgage was a subsisting charge, then that the Plaintiffs might redeem on the usual terms, or that the estate might be sold in execution of the trusts of the will.

The Defendants, by their answer, insisted on the validity of the conveyance of *April* 1796, under which they claimed; and they stated that the testator was, at the time of his death, largely indebted both by specialty and simple contract, and, in fact, wholly insolvent; and that the sum of 70*l.* 16*s.* 8*d.*, paid by *Samuel Manning* on the execution of such conveyance, being the residue of the purchase-money after satisfaction of the mortgage debt, was applied towards the payment of the testator's debts. That *Samuel Manning* entered into possession or receipt of the rents and profits of the freehold land, so purchased by him, before or at the time of the purchase, from which time *Samuel Manning*, up to the time of his decease, and, after his decease, the parties claiming under him continued in the quiet and undisturbed possession of the rents and profits of the said freehold land, without having accounted for or in respect of such rents and profits, and without having in any manner treated or considered the mortgage as subsisting. And the Defendants submitted that, even if the children of the testator and those claiming under them were not, under the circumstances, bound by the sale, they were at all events barred by length of time from redeeming the mortgage; and the Defendants claimed the benefit of such lapse of time as fully and effectually as if they had pleaded the same.

Some evidence on the part of the son of the testator's solicitor was produced to shew that the testator died indebted to a considerable amount, both by specialty and simple

1836.

RAFFETY v. KING.

simple contract debts, and that his personal estate was insufficient to pay his debts; but the deposition of this witness was not supported by any documentary evidence.

The questions raised in the cause were, first, whether the *primâ facie* right of the Plaintiffs to redeem was not barred by lapse of time; and, secondly, whether the making the heir of *Vesey Raffety* a Co-plaintiff, who was bound by the covenants for quiet enjoyment, and for further assurance to support the conveyance impeached by the bill, was not a fatal misjoinder of parties.

Mr. *Pemberton* and Mr. *Hughes*, for the Plaintiffs.

There is no evidence amounting to any proof that the testator died indebted, or that the estate was sold for payment of debts. The sale to *Manning*, the mortgagee, by the tenant for life, and the trustee for the children of the testator who were entitled in remainder, is, on the face of the transaction, incapable of being supported as against the Plaintiffs, who are beneficially entitled under the will. Supposing the mortgage to be a subsisting charge upon the estate, the Plaintiffs are entitled to a decree for redemption, there being no ground for the objection, raised by the answer, that they are barred by lapse of time. That objection is founded upon the supposition that *Manning* was a mortgagee in possession, and that he and the persons claiming under him continued in possession without accounting or acknowledging any title in the mortgagor. But *Manning* was not a mere mortgagee in possession; he was, by the effect of the conveyance, so far as it could operate, a purchaser of the interest of the tenant for life, and a trustee for the persons entitled in remainder, and, in that character, he was bound to keep down the interest of the mortgage during the lifetime of

1836.

RAFFETY v. KING.

the widow. Until the death of the tenant for life, which happened in 1832, the time did not begin to run against the remaindermen: *Corbett* v. *Barker*. (*a*)

Mr. *Turner* and Mr. *Fisher*, *contrà*.

The Plaintiffs having submitted to redeem the mortgage, the only question, so far as the prayer for relief is concerned, is whether they are not barred by lapse of time, *Samuel Manning* and the persons claiming under him having been in undisturbed possession of the estate since the year 1796, without recognising any title in the mortgagor or those who claim under the mortgagor. It is said that the right to redeem accrued only on the death of *Mary Dean*, the tenant for life, who died in the year 1832; but if that position were well founded, a mortgagor would have nothing to do but to settle the equity of redemption of the mortgaged estate on successive tenants for life, in order to postpone the period at which the time should begin to run against the persons entitled in remainder during the subsistence of all the life-estates. It is clear that the remaindermen might have filed their bill at any time during the life of *Mary Dean*. The rule is now settled that, if a mortgagee enters, and retains possession for twenty years without account and without recognising any title in the mortgagor, he shall hold the estate absolutely, without reference to any subsequent estate or interest created by the mortgagor in the equity of redemption. In *Corbett* v. *Barker* (*a*) a question was raised, at the original hearing of the cause, how far the time would run against the remaindermen during the life of the tenant for life, and Chief Baron *Eyre* decided that the time would run, although the mortgagee had taken a conveyance of the life-interest from the tenant for life. It is true, that that decision

(*a*) 1 *Anst.* 138. and 3 *Anst.* 755.

1836.

RAFFETY v. KING.

decision was afterwards, upon a rehearing, reversed by Chief Baron *Macdonald*, but the law of the Court has changed upon this subject; and in *Ashton* v. *Milne* (*a*) the last case in which the point was discussed, the Vice-Chancellor, referring in his judgment to the decision in *Corbett* v. *Barker* by Chief Baron *Eyre*, and the reversal of that decision, says, "I cannot but think that the better decision was reversed." In *Blake* v. *Foster* (*b*) the House of Lords, reversing the decree of Lord *Manners*, decided that the time had run against successive tenants for life, whose estates were created by the will of Sir *Thomas Blake* the mortgagor. *Pim* v. *Goodwin*, which is cited in a note to the report of the case of *Cholmondeley* v. *Clinton* before the House of Lords (*c*) is a case somewhat similar in its circumstances to the present, and was decided upon the same principle which governed the decision in *Foster* v. *Blake*. The final decision in *Cholmondeley* v. *Clinton* (*d*) establishes the rule that adverse possession for a period of twenty years is a bar to any equitable right; and in this case there has been an adverse possession for a period of at least thirty-six years. After so great a lapse of time, it ought to be presumed, even if there were no evidence, that the sale was properly made for the payment of the testator's debts; and if that were otherwise, and it be admitted that there was a trust as between *Vesey Raffety* and the remaindermen against which time would not run, the Plaintiffs, entitled in remainder, have mistaken their remedy; and this consideration suggests another objection to the frame of the suit which precludes the Court from giving the relief sought by the bill. The Plaintiff *John Raffety* is bound by the covenants for quiet enjoyment, and for further

(*a*) 6 *Sim.* 369.
(*b*) 2 *Ball & Beat.* 387. 565.; and 4 *Bligh, N. S.* 140.
(*c*) 4 *Bligh, N. S.* 133.
(*d*) 4 *Bligh, N. S.* 1.

1836.

RAFFETY v. KING.

further assurance in the deed to which his ancestor *Vesey* was a party, and yet in the face of those covenants joins with the *cestuis que trust* to be relieved against the alleged breach of trust. The interests of the remaindermen and the heir-at-law of the trustee are plainly conflicting; and there is, consequently, a misjoinder of parties which according to all the recent authorities renders it impossible that this suit can be sustained: *Cholmondeley* v. *Clinton* (*a*), *King of Spain* v. *Machado.* (*b*)

Mr. *Pemberton*, in reply.

It is difficult to acquiesce in the decision of the case of *Ashton* v. *Milne.* According to the report, a husband seised in right of his wife, and the wife in the year 1784 convey the fee subject to a mortgage term, no fine being levied, nor any act done to bind the wife's right. The wife remains under coverture until 1818; the husband dies in 1826, and upon the son and heir filing his bill to redeem his interest in the fee in 1831, it was held that, because the purchaser, who took at the time of his purchase an assignment of the mortgage term to a trustee for his benefit, continued in possession of the estate for more than twenty years, he acquired the interest of the wife and her heir, notwithstanding their disabilities, as well as the interest of the husband, which was all that could possibly pass by the conveyance.

As to the objection to the frame of the suit on the ground of misjoinder of Plaintiffs, that can only be taken by way of plea or demurrer, and can no more be raised at the hearing than an objection to the suit on the ground of multifariousness.

The

(*a*) 4 *Bligh, N. S.* 1. (*b*) 4 *Russ.* 225.

1836.

RAFFETY v. KING. *Dec. 5.*

The MASTER *of the* ROLLS, after stating the facts of the case.

Primâ facie the Plaintiffs are entitled to a decree. The trust was created for their benefit; their right to have it executed did not accrue till *December* 1832, and since that time there has been no neglect. But their claim is resisted on three grounds: —

First, it is said that the Defendants have been mortgagees in possession without account, and without admission of a mortgage title for more than twenty years before the bill was filed; and that the time ran against the Plaintiffs during the life of their mother *Mary Dean*, the tenant for life.

Secondly, it is said that, after so great a length of time, it ought to be presumed that the sale was properly made, as it might have been, for the payment of *John Dean*'s specialty debts.

And, thirdly, it is said that *John Raffety* as the heir of *Vesey* is bound by *Vesey*'s covenants for quiet enjoyment and for further assurance, and is, therefore, incompetent to sue. The Court, it is said, will not permit him to set aside that which he has covenanted to confirm, and, as he is incompetent to sue, his co-plaintiffs can have no relief.

The last point is in the nature of a preliminary objection, and ought to have been first raised. But I shall consider the three points in the order in which they were brought forward at the bar.

First, as between mortgagor and mortgagee, it is the settled rule that if a mortgagee takes possession in that character, and continues in possession without accounting,

1836.

RAFFETY v. KING.

ing, and without admitting that he possesses a mortgage title only, for twenty years, the mortgagor is barred; that, as against him, the time runs from the moment when the mortgagee takes possession in his character of mortgagee; and that, if the time has once begun to run, if no subsequent admission is made by the mortgagee, it runs on against those claiming under the mortgagor, whatever may be the disabilities to which they may be subjected. But, in this case, the mortgagee did not take possession in his character of mortgagee only; he took possession in his character of purchaser of the equity of redemption under a conveyance of the life estate of *Mary Dean*, who had the right of possession subject to the mortgage, and of the estate in remainder vested in *Vesey Raffety;* and, the case not being a simple case between mortgagor and mortgagee, it is contended, as a general proposition applicable to this case, that, under whatever circumstances, or in whatever right a mortgagee gains possession, if he holds it without account and without admissions for twenty years, the mortgagor is barred, whatever may be the disabilities under which he labours.

In the discussion of this proposition several cases were cited or referred to, and first that of *Corbett* v. *Barker*. In that case the husband and wife mortgaged the wife's estate. In 1740, by lease and release, they conveyed the equity of redemption to the defendant in fee. The defendant took possession: the wife died in 1741, leaving the plaintiff her heir. The husband, who was entitled as tenant by the curtesy, lived till 1785, and, after his death, the plaintiff, as the wife's heir, claimed a right to redeem. The mortgagee had been in possession without account or admission for about fifty years. The plaintiff alleged that the defendant did not take possession as mortgagee, but as purchaser

chaser of the equity of redemption, in which character he had a right to hold during the husband's life.

On the first hearing the bill was dismissed, and Chief Baron *Eyre* said, " If a mortgagee gets into possession, and no bill is brought within twenty years, nor any admission of his holding in trust (as payment of part of the rent, &c.), his estate is absolute. This is a positive rule. The plaintiff might have redeemed notwithstanding the tenancy by the curtesy, and his neglect to do so shall bar him. As to him, the defendant was in the same situation as any other mortgagee."

But, on a rehearing, a decree was made for redemption, and Chief Baron *Macdonald* said, " The defendant, standing in the place of the tenant by the curtesy, was bound to keep down the interest of the mortgage. As mortgagee, he was to receive the interest; uniting the two characters, he is to be considered as having supported the different rights and discharged the duties of each; the same person was to receive and pay. The case does not fall within the general rule."

This case, therefore, if it be not shaken by subsequent decisions, is a direct authority, not for the Defendants, but for the Plaintiffs.

The next case was *Harrison* v. *Hollins* (*a*), and it appears, from the statement of that case, that *Harwar*, the mortgagee, entered in his character of mortgagee only. The time ran against *William Harrison*, the tenant for life, and this seems to have been held effective against the persons entitled in remainder; but there is no report either of the argument or of the judgment.

In

(*a*) 1 *Sim. & Stu.* 471.

1836.

RAFFETY v. KING.

In *Blake* v. *Foster* (*a*) Lord *Manners* decreed a redemption at the original hearing; but his decree was reversed in the House of Lords, principally, as it is said, on the ground of lapse of time. The case is complicated by a variety of circumstances, but considering it as a case only between mortgagor and mortgagee, there had been what courts of equity consider an adverse possession against the successive tenants for life of the equity of redemption, Sir *Thomas* and Sir *Walter Blake*, from 1766 to 1802; and the time having run against the tenants for life, this was held effective against the tenant in tail. In that case, also, it is to be noticed, that a bill to foreclose the equity of redemption was pending at the time when the limitations under which the plaintiff claimed were created by the will of Sir *Thomas Blake* the mortgagor.

Pim v. *Goodwin* (*b*), which was cited at the bar, is the next case in point of date. The only report of this case is Mr. *Bligh*'s note of the bill and answer, in which the dates are imperfectly stated. It appears that *Joseph Wainwright*, between the date of his will and the time of his death, mortgaged the estate for a term of years to *Francis Goodwin*. By his will he gave the estate to his widow for life, subject to the payment of his debts, and with a power to devise the same to his daughter *Ann Wainwright* and his two daughters *Hannah* and *Elizabeth Newham*, but not to any other person, provided they lived, all or any of them. If they died before they possessed the same, the wife was to have power to give it to whom she pleased. He left *Ann*, who, in the pleadings, is called *Ann Cockayne*, his only child and heir. Whether *Hannah* and *Elizabeth Newham* survived is not stated.

Soon

(*a*) *Ball & Beat.* 387. 565.; and 4 *Bligh, N. S.* 140.

(*b*) 4 *Bligh*, 133.

1836.

RAFFETY v. KING.

Soon after the testator's death, and in *February* 1765, *Elizabeth Wainwright*, in consideration of 200*l.* paid to her by *Goodwin*, and of 3*l.* per annum to be paid to her during her life, conveyed the equity of redemption to *Goodwin*, who thereupon took possession of the mortgaged estate. This conveyance of Mrs. *Wainwright* was good as to her life estate, and under her power might have been good as to the remainder, if all the special objects of the power had, as the will is expressed, died before they possessed the estate.

Mrs. *Wainwright* died in *March* 1768, and the answer alleges that *Ann Cockayne* (who, as far as appears, was the only special object of the power then living) was thirty-four years of age, and under no legal disability. If that was so, time then began to run against her. If *Ann Cockayne*, or the persons claiming under her, had filed a bill to redeem some time between *February* 1785 and *March* 1788, *i. e.* more than twenty years after *Goodwin* took possession, and less than twenty years after the title of *Ann Cockayne* accrued in possession, the case would, in some respects, have been like the one now under consideration; but in *Pim* v. *Goodwin* the bill was not filed till 1806, and, if the answer be true, the bill was properly dismissed on the ground of the length of time which had run against *Ann Cockayne* personally, and those claiming under her. In that case another defence was suggested by the answer, viz. that *Elizabeth Wainwright* rightly sold the equity of redemption to raise money for paying debts to which the estate was subjected by the will. But the statement of the conveyance affords no countenance to that suggestion, and there is nothing to shew that any reliance was placed on that defence by the Court.

The

1836.

RAFFETY v. KING.

The next case was *Price* v. *Copner* (*a*), but as it appeared that the mortgagee did not obtain possession till *August* 1796, and the bill was filed in *January* 1816, there really was no question as to the effect of time, and the case has no application to the present.

The next case, in the order of time, is *Reeve* v. *Hicks*. (*b*) In that case it appears that, in the year 1760, certain copyholds were settled to the use of *Ann Reeve* for life, remainder to *Bendall Reeve*, her husband, for life, remainder to their children. The better to secure a sum charged by way of mortgage on certain freehold estates, *Reeve* covenanted that he and his wife would surrender the copyholds to the mortgagee in fee, subject to the same proviso for redemption as was reserved in the mortgage of the freeholds; and the copyholds were surrendered accordingly.

In *August* 1779, *Bendall Reeve*, the husband, released to the mortgagee his equity of redemption in the freehold and copyhold estates, and thereupon the mortgagee entered into possession, and from 1779, for a period of thirty years, during which *Bendall Reeve* lived, the mortgagee and those claiming under him continued in undisturbed possession. *Bendall Reeve* died in 1809, leaving his wife surviving; and in 1820 she filed her bill to redeem the freehold and copyhold estates. The freeholds were subject to a distinct question, in consequence of which they were declared to be irredeemable, but the copyholds were declared to be redeemable. The time was held not to have run against the wife in the lifetime of her husband.

Then

(*a*) 1 *Sim. & Stu.* 347. (*b*) 2 *Sim. & Stu.* 405.

1836.

RAFFETY v. KING.

Then came the case of *Ravald* v. *Russell*. (*a*) There it appeared that, in 1757, the husband and wife by deed and fine executed a mortgage of the wife's estate to *Moore* to secure 600*l*. In *January* 1765, the husband and wife by deed without fine conveyed the equity of redemption to *Moore*, who thereupon took possession; and he and those claiming under him continued in quiet possession till the bill was filed, more than sixty years afterwards.

The wife, to whom the equity of redemption belonged, died before 1780, leaving her husband and her son surviving. A tenancy by the curtesy would have been in the husband, but, subject to that, the equity of redemption descended to the son, who became bankrupt in 1787. The husband died in *December* 1809, and the assignees of the son filed their bill in *November* 1829. The Defendants pleaded the statute of limitations; and the plea was argued before Chief Baron *Alexander*, who overruled it without prejudice to the defendants using the statute as a defence in their answer.

The last reported case is *Ashton* v. *Milne* (*b*), where it appeared that, in 1784, *James Eyre* and *Hannah* and *Frances Ashton* were entitled to the estate in question, in fee, subject to a mortgage term of 500 years vested in *Sarah Bellamy*.

In *January* 1784, *James Eyre*, together with *Hannah* and *Frances Ashton*, and their husbands, conveyed the estate to *Milne*, and *Sarah Bellamy* assigned the term in trust for him. The husbands covenanted to levy a fine of the estate to *Milne* in fee. No fine was levied, but

(*a*) 1 *Younge*, 19. (*b*) 6 *Sim.* 369.

1836.

RAFFETY v. KING.

but *Milne* took possession; and he and those claiming under him continued in quiet possession for about forty-seven years.

In *September* 1796, the husband of *Hannah* died, and from that period time would run against her if her right was not saved by the disability of her sister and coparcener *Frances*.

Frances died in *September* 1818, leaving her husband and the plaintiff *Samuel*, her heir. The husband of *Frances* died in 1826, and the bill was filed in 1831. In the discussion of that case *Reeve* v. *Hicks* and *Ravald* v. *Russell* were not cited.

The bill was dismissed with costs for reasons which are stated in the report, and from which it does not appear that the Vice-Chancellor made any distinction between the cases in which the possession of the mortgagee is referred to his mortgage title only, and the cases in which the possession is referred to, and depends upon some other title. There seems, however, to be a material difference, and that difference appears to be established in the cases I have mentioned.

If the mortgagee enters in his character of mortgagee or by virtue of his mortgage title alone, he is for the period of twenty years liable to account, if called upon, and liable to become trustee for the mortgagor, if payment be tendered to him; but holding himself ready to answer these liabilities, he owes no other duty. He may, if permitted, hold on for twenty years without accounting or admitting his mortgage title, and if he does so, his title becomes as absolute in equity as it was previously at law. The mortgagor having for twenty years neglected to tender payment, or to procure an

an account or admission, is held to have lost his right of redemption, so that the mortgagee in this case has only to look what was at first his mortgage title, and to the length of possession without account or admission.

But if the mortgagee enters, not in his character or in his right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and the to validity of the conveyance he takes; and if the conveyance be such as in law or in equity only gives for his benefit the estate of a tenant for life, he must, as it appears to me, take that estate subject to the duties which are attached to it in the relation which subsists between the tenant for life and the remainder-man.

One of those duties is to keep down the interest of the mortgage, and having united in himself the two characters of mortgagor and mortgagee, he must, in the language of Chief Baron *Macdonald*, "be considered to have supported the rights, and discharged the duties of each." He owes a duty quite distinct from that which belongs to him in the mere character of mortgagee. So it was held in *Corbett* v. *Barker*, and *Reeve* v. *Hicks;* and, in the judgment upon the plea in *Ravald* v. *Russell*, the mortgagee being purchaser of the equity of redemption, and having taken insufficient conveyances, obtained the husband's interest, and nothing more. The length of possession did not avail him.

The argument, on which it is contended that time ought to run against the remainderman in all cases, is, that as the remainderman may redeem, he ought to be barred if he neglects to do so; and, speaking generally, it is clear that the remainder-man has an interest

1836.

RAFFETY v. KING.

which, as against the mortgagee, entitles him to redeem. But if the tenant for life procures an assignment of the mortgage, or if the mortgagee purchases the interest of the tenant for life, it is by no means so clear that the remainderman can, without the consent of the tenant for life, redeem the mortgage vested in him; and the observations of Chief Baron *Alexander* upon that subject, in the case of *Ravald* v. *Russell*, are well worthy of attention.

And, considering the authorities as far as they are applicable to the present case, it appears to me that *Samuel Manning*, when, in addition to his mortgage he obtained the life estate of Mrs. *Dean*, must be deemed to have become liable to the duty of keeping down the interest of the mortgage debt; and, when he obtained the estate in remainder of *Vesey Raffety* the trustee, must be deemed to have become liable to the performance of the trusts which it was the duty of *Vesey Raffety* to perform. *Samuel Manning* having entered as purchaser, and having, during the life of Mrs. *Dean*, united in himself the characters of mortgagor and mortgagee, I think that, during the continuance of that life, time did not run against the persons interested in remainder.

But then it is said, that the sale ought to be presumed to have been effected in order to raise money to pay the testator's debts. Some evidence has been produced to shew that *John Dean* died indebted on specialty, and that his personal estate was insolvent, but the evidence is very unsatisfactory; and, if the sale had been made with the view suggested, I think that care would have been taken to secure and preserve some proper evidence of the fact. Having carefully read the deed, which seems to me to be inconsistent with the argument, I am of opinion that I cannot act on the presumption

presumption that the sale was properly made for the purpose of raising money to pay specialty debts.

As to the objection of *John Raffety* being a Plaintiff, I am not satisfied that, under any circumstances, it would have been considered of such importance as to deprive the other Plaintiffs of the relief to which I think them entitled. There have been cases in which the Court, with a view to substantial justice, has overcome the difficulties occasioned by a misjoinder of plaintiffs. In the case of *Mosley* v. *Taylor*, before Sir *William Grant*, and which is cited in 2 *Younge & Jer.* 520., under the name of *Mosley* v. *Lord Hawke*, a tenant for life, on whose instigation and for whose benefit a breach of trust had been committed, was joined as Plaintiff with the other *cestuis que trust* in a bill against the trustees, who objected to any relief being granted in that state of the record; but the objection was overruled, and a decree made against the Defendant and the offending tenant for life, who was one of the Plaintiffs.

The present case is not so strong. *John Raffety* does not appear to have any interest whatever; he is a mere formal party. But without determining the effect of the objection, if brought forward earlier, I think that it is now too late. If the objection had been stated in the answer, the Plaintiffs might have obtained leave to amend their bill, and make *John Raffety* a Defendant instead of a Plaintiff. In such a case as this, when the objection is reserved to the last moment, and even till after the argument on the merits, I think that I ought not to allow it to prevail.

1836.

March 27, 28.
Nov. 4.

STEED *v.* CALLEY.

Where sanity is impeached, and the evidence is conflicting, the question is not whether the facts adduced in support of it are not in general indications of sanity, but whether they are inconsistent with or sufficiently explanatory of the indications of insanity produced on the other side, on which undoubtedly the *onus* lies.

A testator gave to his niece all his bond-debts, and he gave to *C.*, a person in whom he reposed great confidence, besides other benefits, all the residue of his property. Four months after the date of the will the testator took from a bond-debtor a conveyance of an estate to himself for life, with remainder to *C.* in fee, and the bond was delivered up to be cancelled. *C.* took a part in promoting this transaction, but no direct fraud was established against him, and it did not appear that he exercised any positive control over the testator. Two days afterwards the testator committed suicide. The evidence as to the soundness of the testator's mind was conflicting, many acts consistent with sanity having been done by him up to the time of his death; but the Court being of opinion, upon the whole evidence, that the testator, at the time of purchasing the estate in exchange for the bond, was of unsound mind, and considering the state of his mind in connection with the confidence which he placed in *C.*, without directing an issue, set aside the conveyance, and declared the testator's niece entitled to the benefit of the bond.

RICHARD SMITH being entitled, among other property, to a sum of 4000*l.*, secured by a bond dated the 25th of *September* 1829, and payable to him without interest by *Richard Van Heythuysen*, his heirs, executors, or administrators, within five years from the date thereof, made his will, on the 29th day of *March* 1831, in the following words: — "I give, devise, and bequeath to my niece *Elizabeth*, now the wife of Mr. *Henry Steed*, of *Sudbury*, &c., and to her heirs, all that brick-built dwelling house in which she now resides, situate in the market-place of *Sudbury*. I also give, devise, and bequeath to the said *Elizabeth Steed*, and to her heirs, all those freehold and copyhold messuages or tenements, situate in the *High Street* in *Long Milford*, &c., and also the freehold and copyhold field lying behind and adjoining to the same, upon this condition, that she the said *Elizabeth Steed*, and her heirs, shall permit her father and mother to occupy and enjoy during their lives the house in which they now dwell, together with the garden, &c., free from the payment of rent for the same. I give and bequeath to the said *Elizabeth Steed* the sum of 20*l.* per annum, in the Long Annuities in the

1836.

STEED v. CALLEY

the Bank of *England*, and also all money that shall be due to me upon bond at the time of my decease. I give and bequeath to my dear friend *Melicent Deal* the sum of 15*l.* per annum, in the Long Annuities aforesaid. I give and bequeath to my old and faithful servant *Mary Ward* 10*l.* per annum, in the Long Annuities aforesaid. I give and bequeath to Mr. *Charles Calley* all that copyhold farm situate at *Marston*, and held of the manor of *Heddington*, near the city of *Oxford*, containing by estimation thirty-six acres, now in the occupation of *William Leake*, and which I purchased of the assignees of Mr. *B. Lyon Coxhead*. I give, devise, and bequeath to the said *Charles Calley* the ground rents, which I purchased of Dr. *White*, of four houses, numbered 2, 3, 4, and 5, situate in *Brunswick Square*, &c., subject to the payment of one annuity of 10*l.* to my sister *Sarah Hassall*; and of one other annuity of 10*l.* to my dear friend Mr. *John Jones*, of *Gray's Inn*: both of which said annuities to be free and clear of legacy duty. I also give and bequeath to the said *Charles Calley* two sets of chambers, No. 24. *Lincoln's Inn*, *Old Buildings*, which I hold as freehold for life, in the names of *William Manly* and *Henry Egerton*, Esquires, members of the society of *Lincoln's Inn* aforesaid. I also give and bequeath to *Charles Calley* the house in which I now dwell, No. 106. *Guildford Street*, together with my books, plate, furniture, and every thing else; and do bequeath to him the residue of my property of every kind. And I do hereby appoint the aforesaid *Charles Calley* and *Richard Van Heythuysen* executors of this my will."

On the 10th of *April* 1831, the testator made a codicil, by which he revoked the appointment of *Richard Van Heythuysen* as an executor of his will.

1836.

STEED v. CALLEY.

On the 22d of *July* following the testator gave up *Van Heythuysen*'s bond to be cancelled; and, in consideration thereof, *Van Heythuysen* executed a conveyance, whereby certain lands, situated in the county of *Norfolk*, were conveyed to the use of *Richard Smith* for life, with remainder to the Defendant, *Charles Calley*, in fee. Two days after this transaction, the testator died by his own hand; and upon an inquest held before the coroner, it was declared by the verdict of the jury that the testator shot himself, being at the time in a state of temporary mental derangement.

The bill was filed by *Elizabeth*, the wife of *Henry Steed*, in her character of legatee under the will of the testator, by her next friend, against *Charles Calley*, the executor, and residuary legatee, *Richard Van Heythuysen*, *Sophia Smith*, the testator's heir-at-law, and *Henry Steed*, the Plaintiff's husband; and it prayed that the will and codicil of the testator, so far as regarded the bequest to the Plaintiff of all bonds due to the testator at the time of his death, might be established, and the trusts thereof performed; that it might be declared that the testator was prevailed upon by fraud, and under the influence of the Defendant *Calley*, to accept from *Van Heythuysen* the conveyance of certain lands in lieu of the bond debt, which, at the date of the will, was due from him; that the conveyance might be set aside, and the bond debt re-established; that *Calley* might account for the rents, and that all necessary directions might be given for placing the parties in the situation in which they would have stood, if the transaction had not taken place; or that, under the alleged circumstances of fraud and undue influence, it might be declared that the land ought to stand in place of the bond, and be subject to the bequest to the Plaintiff, and that *Calley* might be declared

declared to be a trustee thereof for the benefit of the Plaintiff.

1836.

STEED v. CALLEY.

The bill alleged that the testator, from the period of his wife's death, which happened in the month of *October* 1829, became extremely low-spirited and nervous; that such lowness of spirits and nervousness continued gradually to increase, and that shortly after the date of the will and codicil the testator was at times violently afflicted with pains in his head, became materially disordered in his intellects, and liable to temporary fits of mental derangement; that, during the latter months of his life, his mind and intellects became generally weak, so that, when he was not suffering fits of despondency and mental derangement, he was of so weak and imbecile a mind as to be perfectly childish, and wholly incapable of understanding or transacting business; that *Calley* was a relation of his wife, and had been taken into his office to assist him in his business, and that whilst the testator was afflicted with low spirits and nervousness *Calley* gradually obtained great influence over his mind, and ultimately, together with Mrs. *Melicent Deal*, another relation of the wife, obtained an absolute power and control over him; that, in this state of the testator's mind, *Calley*, who knew the contents of the will, formed a scheme to avail himself of his influence, and, in execution of that scheme, prevailed on the testator to call for payment of *Van Heythuysen*'s bond, and to accept from him in lieu of the bond the estate in question in the cause.

The Defendant *Calley*, by his answer, said that *Smith*, for several years before the death of his wife, from his constant and assiduous attention to the duties of the several offices which he held, appeared to be occasionally nervous up to the time of her death; and

1836.

STEED v. CALLEY.

that after her death, at which he appeared to be much affected, he was occasionally low-spirited up to the time of his own death; and, as he advanced in years, the weakness of his nerves somewhat increased, arising, as the Defendant believed, from the causes aforesaid, and from his pecuniary losses. But the Defendant denied that the testator became in any manner disordered in his intellects, or liable to any fits of mental derangement, up to the day of his death. He denied that he knew that the testator's mind was imbecile, or that his mind was, in fact, imbecile. He further denied that the testator ever, at any time, had any mental infirmity, up to the day of his death, or that he had any greater bodily infirmity than many men are accustomed to have at his period of life. The Defendant further said that the paternal conduct which, the testator always evinced towards him and his family, amounted to a complete adoption of him as his child. But he denied that he ever at any time acquired, or had any influence or control over the actions of the testator, or that he made himself acquainted with the contents of the testator's will, or any part thereof, or that he in fact knew, before the death of the testator, that the testator had made the will or codicil, or, except as matters of conclusion from conversations, that he had ever made a will or codicil; and, on the whole, he insisted that the transaction as to *Van Heythusen*'s bond and conveyance was directed by the testator himself, and was in entire conformity with his intentions, he being at the time of sound mind, and perfectly understanding what he was about.

Much evidence was gone into, particularly on the part of the Defendant *Calley*, who examined sixty-six witnesses to shew the sanity of the testator; and the argument on each side consisted chiefly of a commentary upon the evidence, the material parts of which, as

as well as the circumstances of the transaction impeached by the Plaintiff, are minutely examined and considered in his Lordship's judgment.

For the Plaintiff, who was interested in impeaching the conveyance, but supporting the will, partly upon the ground of partial insanity and monomania, and partly upon the ground of undue influence exercised by *Calley* in the confidential relation in which he stood towards Mr. *Smith*, the cases of *Dew* v. *Clarke* (*a*) and *Huguenin* v. *Baseley* (*b*) were cited.

For the Defendant, *Calley*, it was insisted that the two hypotheses of monomania, indicated, as it was alleged, by a groundless, but uncontrollable apprehension of poverty, and undue influence on the part of *Calley*, by means of which the testator was prompted to acts of profuse liberality, were inconsistent and destroyed each other; for if the supposed monomania existed, there was no room for the exercise of the imputed fraud and undue influence; and if there was undue influence, there was a state of intellect, which, though feeble, was inconsistent with the alleged monomania.

Mr. *Pemberton* and Mr. *Hetherington*, for the Plaintiff.

Mr. *Tinney*, Mr. *Turner*, and Mr. *Williams*, for the Defendant, *Calley*.

Mr. *Boteler* and Mr. *Chandless*, for the Defendant, *Van Heythuysen*.

Mr. *Heathfield*, for the heir at law.

The

(*a*) 3 *Addams*, 79. 1 *Hagg. Eccl. Rep.* 511., 3 *Hagg. Eccl. Rep.* 250., and 5 *Russ.* 163.

(*b*) 14 *Ves.* 273.

1836.

STEED v. CALLEY. *Nov.* 4.

The MASTER *of the* ROLLS.

In the investigation of this case it is necessary to bestow careful attention, not only to the facts in evidence relating to the principal transaction which is in question, but to all the facts which tend to shew the state of Mr. *Smith*'s mind, Mr. *Calley*'s knowledge of that state, and the relation which subsisted between Mr. *Calley* and Mr. *Smith*.

Mr. *Smith* had for many years been clerk to the late Lord *Ellenborough*, under whose patronage he had obtained several lucrative offices in the courts of common law. Whilst Lord *Ellenborough* retained his office, Mr. *Smith* was crier of the Court of Nisi Prius; up to *April* 1830 he was clerk of common bails, estreats, and posteas, and up to the time of his death he was clerk of the errors in the Court of King's Bench, clerk of the Nisi Prius records in *Middlesex*, and receiver and comptroller of the fees arising in courts of justice. From these several offices he derived a considerable income, and he appears to have become possessed of some independent property. The Plaintiff was his niece. The Defendant *Calley* was no relation to him, but calls himself the second cousin of Mrs. *Smith*, the testator's wife. It was, however, I think stated at the bar, that he used the expression second cousin by mistake, being, in fact, the son of a first cousin of Mrs. *Smith*. In the year 1812, when *Calley* was very young, the testator took him as a clerk into his office of clerk of the errors, and ever afterwards treated him with constant kindness. *Calley* calls his conduct paternal; and says that he considered himself as an adopted child. Several of the witnesses say that the testator and *Calley* appeared like father and son; and it appears beyond all doubt that they always continued together on a most intimate and confidential

confidential footing. When *Calley* married in 1824, Mr. and Mrs. *Smith* took great interest in, and superintended the arrangements made on that occasion; and Mr. *Smith* afterwards became attached to the children.

Mr. *Smith* appears to have been a man of great respectability, and, up to the latter part of his life at least, he was a man of firm and decided character; and, as the witnesses say, not likely to submit to any influence or control of others. He not only filled the offices I have mentioned, but was, and acted as trustee for various persons, and as a governor of the *Foundling Hospital*.

There is no direct proof of particular acts of influence or power being exercised over him by *Calley*, who, in his ordinary demeanour, behaved to the testator with proper attention and respect; but it appears that the testator relied upon *Calley*, and had very great confidence in him.

The bond transaction with Mr. *Van Heythuysen* had its origin in the year 1814. Mr. *Van Heythuysen* having been unexpectedly induced to become the purchaser of the estate which is now in question, and having for many years been on intimate terms with the testator, borrowed from him the sum of 9000*l.* 3 per cent. stock; and, in order to secure the re-transfer, executed a bond, and made a deposit of the title-deeds of the estate. In the year 1829 the testator, who seems to have had considerable regard for Mr. *Van Heythuysen* and his family, was induced to give up that bond, and to accept in lieu of it the bond now in question, which was dated the 25th of *September* 1829, and was conditioned for payment of 4000*l.*, without interest, in five years from the date; and Mr. *Smith* retained in his hands the title deeds

1836.

STEED v. CALLEY.

deeds of the estate as further collateral security for payment of the 4000*l.*

In the statement of the transaction material to be considered in this case, it is necessary to notice that the testator's wife died on the 15th of *October* 1829, and that, in *July* 1830, an act of parliament (*a*) passed for regulating the receipt and appropriation of fees and emoluments receivable by officers of the superior courts of common law; and that, under this act, commissioners were appointed to inquire into the amount and legality of the fees claimed by the officers. These events are alleged to have produced considerable effect on the mind of Mr. *Smith*.

In *March* 1831, Mr. *Smith* employed Mr. *Thomas Amos*, a law-stationer, to prepare his will. Mr. *Amos*, as he says, prepared it by Mr. *Smith*'s dictation. It was dated the 29th of *March*; was attested by *Thomas Amos*, who prepared it, and by *Henry Amos* and *Hannah Forewark*, two of Mr. *Smith*'s servants, and was thus expressed.—(His Lordship read the will.)

Mr. *Smith*, at the dates of his will and codicil, had 170*l.* a year, Long Annuities, standing in his name at the Bank. The bequests of Long Annuities contained in the will did not, in words, refer to the Long Annuities which the testator then had, so as to make the legacies specific. Mr. *Calley*, however, says, that after the testator's death, when application was made to him by the Plaintiff for the legacy of Long Annuities, he was advised and believed that the same was a specific and not a general legacy; and that, as no Long Annuities were standing in the testator's name at the time of his

(*a*) 1 *W.* 4. *c.* 58.

his death, the legacy to the Plaintiff was not claimable. And the facts as to the Long Annuities appear to be these; that, on the 13th of *April*, being only three days after the date of the codicil, the testator and *Calley* went into the city together, and the testator then caused the 170*l.* a year Long Annuities, which were standing in his name alone, to be transferred into the joint names of himself and *Calley*; and that, in a week afterwards, viz. on the 20th of *April*, the testator and *Calley* again went into the city together, and caused the same sum, in the Long Annuities, to be transferred from their joint names into the separate name of *Calley*.

Subscribed to the codicil, but without date, is a memorandum in these words, "Amount of Long Annuities, I believe 160*l.* per annum, sold out and disposed of." And as to this transaction Mr. *Calley*'s statement is in effect, that the object of the testator was to secure the annuities for *Calley* after his own death, but to receive the dividends during his life; and he made the transfer, being perfectly satisfied that *Calley* "would do every thing that was honourable." This was certainly, in the way in which the case is put by the Defendant, an instance of very great confidence reposed in him by the testator.

The Plaintiff was also legatee of the money which should be due to the testator on bond at the time of his decease. *Van Heythuysen*'s bond was not payable till *September* 1834; but on the 20th of *June* 1831, and without any reason to shew why he desired earlier payment, the testator called on *Van Heythuysen*, and expressed a wish that the estate which was collateral security for the payment should be made available immediately. *Van Heythuysen* answered, that the estate would not then sell, but that he intended to offer it for sale

1836.

STEED v. CALLEY.

sale in the then next spring. On the 24th of *June*, *Calley* went to *Van Heythuysen*, and stated, that the testator had been ill-used by *Van Heythuysen* on the subject of the bond; and on this occasion *Van Heythuysen* told *Calley* that the bond should be paid when due, or sooner, if the estate should be sold sooner, or, if Mr. *Smith* and his friends preferred it, *Van Heythuysen* was willing at any time to convey the estate to Mr. *Smith* in lieu of the bond. The offer to convey the estate in lieu of the bond appears, therefore, to have proceeded from *Van Heythuysen*; and it is proved, not on the part of the Plaintiff, and therefore not against *Calley*, but on the part of *Van Heythuysen*, that on the 28th of *June*, after an interview between Mr. *Van Heythuysen* and a gentleman, who, in the evidence, is called Mr. *Marshall Jones*, *Calley* called on *Van Heythuysen*, and informed him that it was the particular wish of the testator to become the purchaser of the estate for the bond, if *Van Heythuysen* would pay the *ad valorem* duty; and, *Van Heythuysen*, having hesitated, *Calley* added, it would calm the testator's mind. *Calley*, of course, is not to be charged with anything which is not regularly proved, or deducible from what is regularly proved against him; but in respect to the state of the testator's mind towards *Van Heythuysen*, it is proper to observe that there is another undated memorandum subscribed to the codicil, in these words: — "Mr. and Mrs. *Van Heythuysen*'s conduct to me has been most ungrateful, wicked, and dishonest." For some reason or other it is clear that, when the memorandum was written, the testator's mind was in a state of irritation against *Van Heythuysen*. No cause for this irritation is stated, nor any foundation for the imputation contained in the memorandum. *Van Heythuysen*'s debt was reduced to 4000*l*. in the year 1829. That transaction has not been impeached. The bond for the reduced sum was not

1836.

STEED v. CALLEY.

not payable in *July* 1831, and no ground of complaint against Mr. or Mrs. *Van Heythuysen* appears.

Van Heythuysen, however, agreed to sell the estate for the bond, and lent the draft of the conveyance to himself to *Calley*, in order that the proposed conveyance to Mr. *Smith* might be prepared from it. Soon afterwards *Van Heythuysen*, at the request of *Calley*, consented to prepare the conveyance; but *Calley* having, on a subsequent day, stated that it was the testator's wish that the estate should be conveyed absolutely to *Calley*, *Van Heythuysen* refused to have any thing further to do with the conveyance; and thereupon, and on the 6th of *July* 1831, Mr. *Burton Lane* was applied to by *Calley* respecting the conveyance. Mr. *Burton Lane* had known both Mr. *Smith* and Mr. *Calley* for many years. A great intimacy had subsisted between Mr. *Smith* and Mr. *Lane*'s family, but notwithstanding that long acquaintance and great intimacy, Mr. *Lane* thought *Calley* was Mr. *Smith*'s nephew, and that Mr. *Smith* had no other relation. On the 6th of *July*, *Calley* informed Mr. *Lane* that Mr. *Smith* desired to have the estate for the bond, and that *Van Heythuysen* objected to prepare the conveyance, because there was no consideration between him and *Calley*, and the deed would be voidable. On the next day the testator and *Calley* went together to Mr. *Lane*. *Calley* went away, and left the testator alone with Mr. *Lane*, and Mr. *Lane* says that the testator expressed his intention to give the estate to *Calley*, was dissatisfied to find any objection to an immediate conveyance, and said he did not wish to have the trouble of looking after the estate. After this Mr. *Lane* instructed Mr. *Measure* to prepare the draft conveyance, and, in the instructions, it was expressed that "Mr. *Smith* being old and infirm, wishes this estate to be conveyed to his nephew, Mr. *Charles Calley*, if it can legally

1836.

STEED v. CALLEY.

legally be done;" and also, that "it would be desirable to have the draft of this deed prepared without loss of time, in consequence of the precarious state of Mr. *Smith*'s health." The draft being prepared, was submitted to Mr. *Van Heythuysen* on the 18th of *July*, and returned by him on the 19th. On that day Mr. *Lane* says that he stated the effect of the deed of conveyance to Mr. *Smith*, and on the 21st the deeds were executed by Mr. *Smith* in Mr. *Lane*'s presence, at his chambers; and Mr. *Lane*, in his evidence, thus expresses himself.

[His Lordship read parts of the evidence of Mr. *Lane*, stating that the deed was attentively examined by Mr. *Smith* before he executed it, and that there was nothing in the conduct or conversation of Mr. *Smith* to induce the witness to doubt his sanity, and that *Calley* exercised no control or influence over him, as the witness believed, when Mr. *Smith* gave instructions to prepare the deed.]

The deeds were executed by *Van Heythuysen*, and the bond delivered up on the 22d of *July*.

Some inaccuracies in the evidence of Mr. *B. Lane* were observed upon; but I cannot say that they appear to me to be very important. The observation, however, that he was totally ignorant of the relation which really subsisted between the testator and *Calley*, is material. If Mr. *B. Lane* had known that *Calley*, instead of being a nephew and the only relation of the testator, was not at all related to him in blood, and that the testator had near relations of his own living, he might have thought it right to exercise another sort of vigilance in this business.

It

1836.

STEED v. CALLEY.

It appears that, whilst this transaction was pending with *Van Heythuysen*, another with the Plaintiff was in progress. In the early part of *July* the Plaintiff had been in town on a visit to the testator, and some communication between him and the Plaintiff must have taken place upon a proposal to convey to the Plaintiff at once the property which, by his will, he had devised to her; and with reference to this proposal, the Plaintiff, about the 6th or 7th of *July*, wrote to Mr. *Smith*, and amongst other things says, "I have seen Mr. *Steadman* (who is a solicitor at *Sudbury*) respecting the deeds you were kind enough to mention; he will convey them for 10*l.*; he wishes you to let him know, as soon as convenient, your intention. I should have written yesterday, but could not see Mr. *Steadman* till this morning." After some strong expressions of gratitude, she says, "I hope by this time you are a little more composed," &c. Mr. *Steadman* afterwards had a personal interview with Mr. *Smith*, and received his instructions to make a conveyance to the separate use of the Plaintiff. In giving the instructions, Mr. *Smith* acted like a competent man in business, and appeared to understand perfectly what he was doing. Mr. *Steadman* acted upon his instructions, sent them to his *London* agent, to get them executed; and they were executed by Mr. *Smith* on *Saturday* the 23d of *July*.

On the morning of the 24th, Mr. *Smith* committed suicide; and the coroner's jury found that he shot himself, being at the time in a state of mental derangement. That he was then insane, is not, indeed, disputed; but it is contended that his derangement at that time was a sudden infliction, and that until then he was never subject to any mental disorder.

Mr. *Calley*, for the purpose of meeting the charge of insanity, has produced a great deal of testimony as

1836.
STEED v. CALLEY.

to the state of Mr. *Smith*'s mind. He has not only proved in general terms that Mr. *Smith* was a man of firm and decided character, but that, up to the 23d of *July* 1831, he performed many of his ordinary duties in an able and efficient manner; and he has shewn Mr. *Smith* on various occasions, during the months of *April*, *May*, *June*, and *July* 1831, occupied as an intelligent man, not only in the usual concerns of domestic and social life, but also in the transaction of several important matters of business affecting accounts and property. It is not necessary, nor would it be useful, to state the evidence in detail. I have carefully read and considered the whole; and it appears to me to be proved, that in the transaction of ordinary business, and to common observers, Mr. *Smith* in many instances appeared to be of sound mind, and conducted himself as a man of sound mind might be expected to do. The unexceptionable evidence of Mr. *Wigglesworth*, Mr. *Bailey*, and Miss *Copner* relates to his conduct on the 23d of *July*. Mr. *Calley* has alleged that Mr. *Smith* punctually fulfilled the duties of his several offices in person, and also transacted private business of importance, and acted as trustee for various persons, and managed his household affairs, and kept his accounts both public and private with accuracy and exactness, and partook of the society of his friends, and paid and received their visits up to the day of his death; and the particular facts which Mr. *Calley* has proved appear to me to be consistent with that general allegation.

But apparent sanity on some or many occasions is no proof that the mind may not be insane. Lord *Eldon*, in *Ex parte Holyland* (*a*), has told us of two instances, in one of which a lunatic was so far competent to transact business, that he was actually employed in the management

(*a*) 11 *Ves.* 10.

nagement of the estate of his own committee; and in the other of which he himself (then at the bar), after various conferences with the lunatic, became fully satisfied of his sanity, and was not aware of his mistake till the lunatic came to thank him for his exertions after he had procured a *supersedeas* of the commission. The instances are numerous in courts of justice in which lunatics, aware that some of their ideas are imputed to insanity, have used ingenious and rationally contrived artifices to avoid reproducing those particular ideas. The ordinary habits of society, or the exertion required for the transaction of business, may restrain or rouse the mind, and prevent it from brooding on melancholy thoughts; and an insane man may, and often does, conduct himself rationally, both in society and in the transaction of business, so long as nothing occurs to call up or suggest the delusive notions which constitute or indicate the insanity.

Generally speaking, the law presumes sanity, and, if it be not impeached, no evidence is required to support it. When it is impeached, and the evidence is conflicting, the question is, not whether the facts adduced in support of it are not, in general, indications of sanity, but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity produced on the other side, on which, undoubtedly, the *onus* lies. Although Mr. *Smith*, on the 23d of *July*, transacted business as a rational and intelligent man with Mr. *Wigglesworth* and Mr. *Bailey*; although, on the same day, he visited a public exhibition for his amusement, and in the evening took leave of Miss *Copner* as the intelligent master of a house would take leave of a guest whose return would be welcome; although, at a quarter before nine o'clock on the morning of the 24th, he appeared to the person whom in his

1836.

STEED v. CALLEY.

will he calls his old and faithful servant *Mary Ward* to be much the same as usual, and did not appear to be particularly agitated; yet in half an hour from that time he had perished by his own hand, and in a pocket-book by his side was found a paper containing these words: — "Unsuccessful speculations and lending money have been my ruin, and have reduced me from affluence to poverty. Misery! misery! Thou great God of mercy, forgive a penitent and repentant sinner, I implore thee. Almost blind, lame, nervous, and palsied all over; can neither read nor write without distress and pain."

Mr. *Calley* said truly that this paper shews that Mr. *Smith* was under a delusion, and supposed that he was in a declining state, and suffered from loss of sight and other infirmities.

But, as Mr. *Calley* expressly denies that the testator ever at any time had any mental infirmity, up to the day of his death, he must mean it to be understood that this delusion was a sudden infliction, unconnected with any previous mental disorder, and wholly unexpected. How far this is accordant with the facts must, if possible, be ascertained, not merely by considering the instances of apparent sanity adduced by the Defendant, but by considering them in conjunction with the evidence adduced for the Plaintiff. Besides *Thomas Amos*, who prepared the will, the Plaintiff has examined five witnesses, the three servants and two intimate friends of Mr. *Smith*.

[His Lordship here entered into a minute examination of the evidence, and at the close of it proceeded as follows: —]

On

1836.

STEED v. CALLEY.

On a careful consideration of the evidence, I am of opinion that the state of mind which led to the dreadful termination of Mr. *Smith*'s life was not a sudden infliction, unconnected with any previous mental disorder, and was not wholly unexpected by those who best knew him.

He had suffered considerable mental uneasiness from the time of his wife's death, and the inquiry respecting the fees of his office alarmed and disturbed him. He was annoyed and distressed by the proceedings of the commissioners; feared that he might be called upon to refund what he had received; thought he might be reduced to poverty and ruined, and that he should die in a workhouse. Some of these impressions might be perfectly rational; others might, in their commencement at least, be exaggeration, which could scarcely indicate insanity: but his mind dwelt upon them; they produced an increasing dejection and despondency, and, at length, a propensity to self-destruction. To his servants, something appeared to hang heavy upon his mind; he became lost to all cheerfulness, indifferent to every thing about him, and to life itself; willing to let people about him do what they liked if they would not trouble him, and sometimes wandering in his mind, as if he knew not what he was doing. To his friend, Mr. *Ladley*, he wished that he was dead, or that somebody would shoot him. To Mr. *Rose* he talked of destroying himself, and desired him not to be surprised at his putting an end to his own life; and from these gloomy thoughts he could not be relieved by the representations or reasonings of Mr. *Rose*.

Was Mr. *Calley* ignorant of this melancholy state of Mr. *Smith*'s mind? He visited Mr. *Smith* continually,

1836.

STEED v. CALLEY.

sometimes twice or thrice a day; he used often to pass the evening at Mr. *Smith*'s; he was at all times on the most confidential terms with him, connected with him not only in the transaction of the business of his office, but by continued and familiar intercourse in private life. In his answer, he admits that Mr. *Smith*, for several years before the death of his wife, appeared to him to be occasionally nervous up to the time of her death, and, after her death, he was occasionally low-spirited, up to the time of his own death; and, as he advanced in years, the weakness of his nerves somewhat increased; and before the coroner Mr. *Calley* said that "Mr. *Smith* had been in a nervous state since the death of his wife, often complaining of a pain in his head; that his circumstances were very comfortable; that he had left witness his executor, and a great deal of property. No doubt, he was under an aberration of mind at the time he destroyed himself. He left a few lines on paper, which shewed that that he was under a delusion, and supposed he was in declining circumstances, and that he suffered from loss of sight and other infirmities." But was this all Mr. *Calley* knew? Was he altogether unapprised of any thing inconsistent with his denial that the testator ever, at any time, had any mental infirmity up to the day of his own death?

This is not left to conjecture: Mr. *Smith*'s nervousness, before the death of his wife, is only mentioned in Mr. *Calley*'s answer; and his low spirits, after that event, are described by Mr. *Smith* himself in *September* 1830. [His Lordship read passages in letters addressed by Mr. *Smith* to *Calley* to this effect.]

These letters do not indicate insanity; they shew a man struggling against painful impressions, and not without

without hope of overcoming them in part at least. They were, however, calculated to awaken the attention of Mr. *Calley* to the state of Mr. *Smith*'s mind.

The witnesses go further: Mr. *Rose* says, "I did express a doubt once to Mr. *Calley* as to the soundness of the late Mr. *Smith*'s mind as to his pecuniary affairs, as he was continually complaining that he was ruined; but I thought upon every other subject he was perfectly sane." And Mr. *Ladley* not only told *Calley* that he thought Mr. *Smith* was labouring under an aberration of mind at the time of the transfer of the trust stock, but having, as he says, a foreboding that *Smith* would some day put an end to his own existence, he expressed his apprehensions on that subject to *Calley*, who at that time persisted in saying that Mr. *Smith* knew what he was about.

Mr. *Calley* therefore knew the opinion of two of the most intimate friends of Mr. *Smith* on the state of his mind; and the evidence of *Mary Ward* shews that Mr. *Calley* himself was not without some forebodings on the subject; for she says, "I heard Mrs. *Rule* and some of Mr. *Ladley*'s family, as well as *Charles Calley* himself, and his wife, Mrs. *Calley*, repeatedly say what a wretched state Mr. *Smith* was in, and they did not know what would be the consequence, and use other similar expressions in reference to Mr. *Smith*'s state of mind."

And some circumstances tending to throw further light on the subject accrued on the day of Mr. *Smith*'s death. On the same day, although the letter appears to be dated by mistake on the 23d, instead of the 24th of *July*, Mr. *Calley* wrote to Mr. *Ladley* as follows: —

1836.

STEED v. CALLEY

"Dear *Ladley*,

"The dreadful event has happened, and your friend Mr. *Smith* is no more. He died this morning at nine, and we are in great trouble and much affliction.

"Yours truly,

"*C. Calley.*"

The manner in which the event is spoken of in this short letter appears to me to shew that *Calley* knew he was addressing a mind prepared to receive the intelligence, and to carry with it a proof that the subject had previously been mentioned between *Ladley* and *Calley*; and there is one incident sworn to by *Hannah Forewark* and *Mary Ward*, which is not to be passed over. A Mrs. *Deal* (Mr. *Calley*'s aunt) had lived with the testator from the time of his wife's death. In the bill, she is charged with exercising great influence over Mr. *Smith*, at the instance and for the benefit of *Calley*. This charge is not proved; but she was in Mr. *Smith*'s house at the time of his death, and the evidence of *Hannah Forewark*, which in every thing important is confirmed by *Mary Ward*, is as follows:—"Immediately after Mr. *Smith*'s death was discovered, Mrs. *Deal* was sent for by *Charles Calley* into the parlour, and was informed of what had taken place; upon which she exclaimed, "Oh! he was mad—he was mad—I always said that he was—it is in the family—his brother died raving mad—and his mother——" and, before she completed the sentence, Mr. *Calley* went up to her, and, putting his hand on her shoulder, said, "Now, for God's sake, hold your tongue, or you will just undo all that we have been doing;" to which Mrs. *Deal* replied, "I will! I will!" This strange incident is charged in the bill nearly in the words in which it is proved. Mr. *Calley* has denied it, not absolutely, but according to his remembrance and belief. Mrs. *Deal* is living, and

and no reason appears why she might not have been examined; but Mr. *Calley* has not examined her.

There is no proof, and I do not permit myself to conjecture, what Mr. *Calley* meant by the words he is proved to have addressed to Mrs. *Deal;* but I think that such an expression could not have been used, if the insanity then imputed to Mr. *Smith* had been an idea which had not occurred to Mr. *Calley* before Mr. *Smith*'s death.

There are other very singular expressions of Mr. *Calley*, sworn by *Mary Ward* to have been used by him on the day of Mr. *Smith*'s death; but, as those expressions are not charged in the bill, as, under the circumstances, I think they ought to have been, I do not dwell upon them.

There is one other circumstance, which I ought, perhaps, to notice: it is charged in the bill, that at the date of the codicil, and at the time of the transaction with *Van Heythuysen*, *Calley* knew the contents of the will. *Calley* denies that he knew any thing of the will till after Mr. *Smith*'s death. It so happens, that, on the very day on which that event happened, *Calley*, in writing to Mr. *Steed*, says, "Mr. *Smith* having left me executor, I at present intend having the funeral," &c. How Mr. *Calley*, ignorant of the will before the testator's death — no relation — knowing that relations of the testator were living, and apparently without any authority of his own to inquire, became so soon acquainted with this part of the will, is unexplained; but as he denies it, and it is not proved, I cannot conclude that he did know the contents of the will before Mr. *Smith*'s death. But, upon a consideration of all the facts proved, not relying upon the inferences made by the witnesses,

1836.

STEED v. CALLEY.

witnesses, but considering, as I have best been able, the inferences justly deducible from the facts which are established, it appears to me, that, notwithstanding many acts of themselves consistent with sanity which were done by Mr. *Smith* up to the evening of the day before his death, his mind was, and was by Mr. *Calley* known to be, seriously disordered; not so disordered and unsound as to make all his acts insane; very far from it: when roused and vigilant, he was probably capable of conducting himself as a man of sound mind might be expected to do; but his mind was, I conceive, so disordered as to be subject to, though not always affected by, delusions in matters relating to his own property and circumstances; subject to false impressions, having the most serious influence upon the view which he took of his future life, and upon his conduct in reference to it; and extremely liable to be swayed by a person in whom he confided, and who was willing to manage his affairs for him.

That he relied, and greatly relied, on Mr. *Calley*, seems beyond doubt. Mr. *Calley* admits that, on the occasion of the transfer of the long annuities, the intention of the testator was to trust him for payment of the dividends during Mr. *Smith*'s life. For any thing that appears to the contrary, the confidence was implicit, and unattended by any voucher or document which afforded the least security to Mr. *Smith*. Whether the conveyance from *Van Heythuysen*, which was first directed to be made absolutely to Mr. *Smith*, and then absolutely to Mr. *Calley*, and finally was made to the use of Mr. *Smith* for life, with remainder to *Calley* in fee, was meant as to any part to be a trust, does not appear; and I know not how to explain, upon any rational view, the facts that Mr. *Smith*, apprehending that his increasing poverty would bring him to die in a workhouse, nevertheless was giving away one property to his niece and another to

to *Calley*. The evidence of Mr. *Lane* would certainly shew that Mr. *Smith* intended a gift; but Mr. *Lane* appears to have known none of those circumstances which Mr. *Calley* did know, and which were indicative of the state of Mr. *Smith*'s mind, and the apprehensions under which he suffered.

As I have noticed before, Mr. *Lane* would probably have thought it right to exercise another sort of vigilance, if he had been aware of the truth respecting Mr. *Smith*'s relations; and his observations and conduct might altogether have been so different, if he had known the facts proved by Mr. *Rose* and Mr. *Ladley*, that, without throwing any imputation upon his evidence, it is impossible to attach to it the importance to which, in other circumstances, it would have been entitled. At the date of the transaction in question, Mr. *Smith* was not so insane as to be unconscious or ignorant of the mere acts which he was then performing. He knew that he was taking for himself and for *Calley* an immediate estate in land, in lieu of a bond payable to himself on a future day. That he should know this is consistent with all the facts proved. But the real question is as to the state of mind in which the act was suggested or contemplated, or which produced or was acted upon by the motives under which preparation was made for the act, and the act itself was performed; and, upon the best consideration which I have been able to give to the subject, this state of mind was unsound.

If the result of this cause as against Mr. *Calley* had depended on the single question, whether Mr. *Smith* was or was not of unsound mind at the time when this transaction took place, I might have found it to be my duty to direct an issue to try the fact; but the state of Mr. *Smith*'s mind is to be considered in connection with his confidence in, and reliance on Mr. *Calley*; and it appears

1836.

STEED v. CALLEY.

appears to me that a sufficient case is made out to make it incumbent on me to declare, that the transaction of purchasing the estate for the bond, so far as relates to the beneficial interest conveyed to *Calley*, ought to be set aside. Knowing as he did the state of Mr. *Smith*'s mind, and aware as he must have been of the confidence which Mr. *Smith* placed in him, I think that he ought not to have assisted or taken a part in promoting this transaction; and, upon a principle in many respects analogous to the principle of public policy, which makes it the duty of this Court to watch and control all transactions between guardian and ward, and other persons in relative fiduciary situations, Mr. *Calley* could not be permitted, under such circumstances, to accept a benefit of such a nature from Mr. *Smith*. In my view of this case, it is not necessary to conclude that Mr. *Calley* was meditating a direct fraud against the Plaintiff; and it does not appear to me that any imputation rests upon Mr. *Van Heythuysen*, who, for any thing which appears to the contrary, was wholly ignorant of the state of Mr. *Smith*'s mind. If the estate had been conveyed to Mr. *Smith* absolutely, a question of considerable difficulty might have arisen between the Plaintiff and heir-at-law of Mr. *Smith*; but as the case stands, considering the weight of evidence as to the state of Mr. *Smith*'s mind, and that the transaction is void as to *Calley*, I think that I cannot divide it into parts for the purpose of admitting the claim of the heir; and I think that the transaction was altogether void as against the testator. If the Plaintiff had insisted upon it, I am of opinion that she would have been entitled to have the bond re-established; but, as she offered to take the estate in lieu of it, I think that I am bound to give it to her.

Declare that the deed of conveyance, in the pleadings mentioned to bear date the 22d day of *July* 1831, and the delivery up of the bond of the 25th of *September* 1829, were

1836.

STEED v. CALLEY.

were void as against the testator; and that the Plaintiff is entitled to have the said bond re-established, and to have the money thereby secured paid to her as part of the money due to the said testator on bond at the time of his death, and bequeathed to her by the said will. But, the Plaintiff having, by her counsel, offered to take the estate comprised in the said conveyance in lieu of the said bond, and the Defendant *Van Heythuysen* making no claim to the said estate, declare that the Defendant *Calley* is to be deemed to have held the same as a trustee for the benefit of the Plaintiff; and let him account for the rents and profits thereof to the Plaintiff, and convey the same to her, or as she shall appoint, and all proper parties are to join in the conveyance, and also in releasing the Defendant *Van Heythuysen* from the bond.

The Plaintiff is to pay the costs of the Defendants *Van Heythuysen* and *Elizabeth Smith*, and add the same to her own costs, which are to be paid by the Defendant *Calley*.

BARNETT *v.* MOLE.

1837.
April 4. 12.

An order *nisi* to dissolve an injunction, after publication of evidence in the cause, is irregular.

THE bill was filed on the 11th of *July* 1835, to restrain the Defendant from proceeding in an action at law on a promissory note, and to have the note delivered up; the Defendant filed his answer on the 12th of *October* following; the bill was amended on the 25th of *November;* and the common injunction, obtained for want of an answer to the amended bill, was on the 17th of *December* extended to stay trial. The answer to the amended bill was filed on the 25th of *February* 1836.

1837.

BARNETT v. MOLE.

1836. The Plaintiff filed a replication on the 14th of *June* following, and publication passed in *January* 1837. On the 16th of *February* following, the Defendant obtained an order *nisi* to dissolve the injunction.

Mr. *Pemberton* and Mr. *Webster* now shewed cause against that order; and contended, that, as publication had passed and both parties were aware of the evidence, and the cause had been set down for hearing, the order to dissolve the injunction was irregular. The usual application to dissolve an injunction was founded upon the case made by the answer; but, where the Plaintiff had gone into evidence to disprove the answer, and the cause was ripe for hearing, the time for applying to be put into a condition to continue the proceeding at law had gone by, and it was for this Court alone to determine the cause upon the whole merits.

Mr. *Kindersley* and Mr. *Piggott*, *contrà*, insisted that the Defendant was entitled to the order *nisi* to dissolve at any time before the hearing of the cause; and they cited *Molineux* v. *Luard* (*a*), where a motion to dissolve was made after replication and *subpœna* to rejoin, and rules had been given to produce witnesses; and *Grant's Practice* (*b*), where it is said that it is immaterial at what time the order *nisi* is obtained.

The MASTER *of the* ROLLS said he would inquire into the practice of the Court as to the point whether an order *nisi* to dissolve an injunction could be regularly obtained after publication of the evidence. It appeared, from the report of the case of *Molineux* v. *Luard*,

(*a*) 2 *Dick.* 684.

(*b*) vol. i. p. 338. The case in 2 *V.* & *B.* 42., there cited, does not support the proposition stated in the text.

1837.

BARNETT v. MOLE.

Luard, that a replication did not stop the Defendant's right to obtain the order *nisi* to dissolve; and, in general, the Defendant, in a competent time after the filing of his answer, was entitled to have the injunction dissolved, unless the Plaintiff could shew, from admissions in the answer, a probable case for continuing the injunction until all the proofs could be regularly brought before the Court at the hearing. But in this case the application to dissolve the injunction had been delayed until all the proofs were ready for the consideration of the Court, and the cause was set down for hearing. This was a sufficient ground for refusing the present application, supposing the order *nisi* to have been regularly obtained. The costs of the motion would depend upon the result of his inquiries as to the practice.

April 12.

On a subsequent day, his Lordship said he had inquired into the practice of the Court, and could find no instance in which an order *nisi* to dissolve an injunction had been obtained after publication of evidence in the cause. With respect to the case of *Molineux* v. *Luard*, it appeared, from the registrar's book, that the order, made in that case after replication, was made by consent. As the Plaintiff had shewn sufficient cause for continuing the injunction, and no instance could be shewn of an order *nisi* to dissolve an injunction after publication had passed, his Lordship decided that the Defendant must pay the costs.

1837.

BETWEEN

CHARLOTTE JOHNSON, Wife of THOMAS PAOLI HOBART JOHNSON, by her next Friend, - - - - - Plaintiff;

AND

THOMAS PAOLI HOBART JOHNSON, WILLIAM FREEMAN, WILLIAM FREEMAN COE, YORKE WILLIS JOHNSON, RICHARD CHILD WILLIS, Clerk, WILLIAM BAKER, JERVOISE BUGBY, and GEORGE FELL, Defendants.

(BY SUPPLEMENTAL BILL.)

Between the same - - - Plaintiff;

AND

June 27, 28. GEORGE GREEN and FRANCIS ROLFE, Defendants.

A female infant, entitled to a legacy of stock, given in trust to be accumulated till she should attain twenty-one, and to be then transferred to her for her separate use, cannot transfer her interest in such legacy by the act of marriage to her husband; and, if married at the time when she attains her majority, she takes an absolute interest in the legacy for her separate use.

ANNA MARIA ELMES YORKE, spinster, made her will, dated the 2d of *July* 1821, in the following words:—"I give and bequeath unto my executors, hereinafter named, the sum of 800*l.* 5 per cent. annuities, upon trust that they my executors, or the survivor of them, do continue the said sum of 800*l.* in the said stocks or funds, and do annually receive the interest and dividends to accrue thereon, which I direct may be laid out in the purchase of like annuities, and added to the principal sum of 800*l.*, from time to time, until my great niece, *Charlotte Yorke*, the daughter of my late deceased nephew, *Edward Whiston Yorke*, shall attain

1837.

JOHNSON v. JOHNSON.

attain the age of twenty-one years; at which time I hereby direct my executors to transfer and pay over to her, the said *Charlotte Yorke*, the whole of the said principal sum of 800*l.*, together with all the stock which may have been purchased with the interest thereof, as hereinbefore directed, and all other accumulations thereon, for her own sole and separate use and benefit absolutely. And the testatrix appointed *William Freeman* and *William Freeman Coe* executors of her will.

The testatrix died in the month of *May* 1826, leaving the Plaintiff, her great niece named in the will, then an infant, surviving her; and her will was duly proved by the executors named therein, who set apart the sum of 800*l.* 5 per cent annuities, which was afterwards converted into 814*l.* 1*s.* 6*d.* new 3½ per cent. annuities, to answer the legacy.

On the 5th of *September* 1831, the Plaintiff, being then an infant, intermarried with the Defendant, *Thomas Paoli Hobart Johnson*, and there was issue of the marriage one child, the infant Defendant *Yorke Willis Johnson*.

By an indenture, dated the 22d of *March* 1833, and made between *Thomas Paoli Hobart Johnson* and his wife, the Plaintiff, of the first part, and the Defendants, the Revd. *Richard Child Willis*, *William Baker*, and *Jervoise Bugby*, trustees, of the other part, reciting the will of *Anne Maria Elnes Yorke*, it was witnessed that *Thomas Paoli Hobart Johnson*, and the Plaintiff, *Charlotte* his wife, assigned to the said trustees, and their executors, &c. the sum of 814*l.* 1*s.* 6*d.* new 3½ per cent. annuities, into which the sum of 800*l.* 5 per cent. annuities, bequeathed by the will, had been converted, until

1837.

JOHNSON v. JOHNSON.

the Plaintiff should attain the age of twenty-one years, and all the right, title, and interest of the said *Thomas Paoli Hobart Johnson* and *Charlotte* his wife, in the same, upon trust to pay the dividends and interest to *Thomas Paoli Hobart Johnson* for his life, and after his decease to the Plaintiff for her life, and after the decease of the survivor of them, upon trust for the children of the marriage, as *Thomas Paoli Hobart Johnson* and the Plaintiff should during their joint lives appoint, and, in default of appointment, for the children in manner therein mentioned.

There was issue of the marriage one child, the Defendant *Yorke Willis Johnson*.

By an indenture, dated the 19th of *August* 1833, between *Thomas Paoli Hobart Johnson*, and the Plaintiff, *Charlotte* his wife, of the first part, the trustees of the indenture of settlement of the 22d of *March* 1833, of the second part, and the Defendant *George Fell*, of the third part, reciting the settlement, and that there was standing in the joint names of *W Freeman*, and *W. Freeman Cox*, the sum of 814*l.* 1*s.* 6*d.* new 3½ per cent. annuities, and accumulations amounting to the sum of 270*l.*, under the trusts of the will of *Anna Maria Elmes Yorke*, it was witnessed, that for the considerations therein mentioned, *Thomas Paoli Hobart Johnson* and the Plaintiff, directed and appointed, and the trustees assigned and transferred to *George Fell*, his executors &c., all the interest and dividends to which *Thomas Paoli Hobart Johnson* and the Plaintiff were or should be entitled in the said sum of 814*l.* 1*s.* 6*d.* new 3¼ per cent. annuities, and accumulations, for securing to *George Fell*, his executors, &c., an annuity of 35*l.*, thereby granted, during the joint lives of *Thomas Paoli Hobart Johnson*, and the Plaintiff his wife.

On

1837.

JOHNSON v. JOHNSON.

On the 11th of *April* 1834, the Plaintiff attained her age of twenty-one years; and in *July* following she filed, by her next friend, the original bill, which prayed that the Plaintiff might be declared to be entitled to have the sum of 814*l.* 1*s.* 6*d.* new 3½ per cent. annuities, with the interest and accumulations, transferred and paid to her, as directed by the will, for her separate use, and that the same might be transferred and paid accordingly; but if the Court should be of opinion that the Plaintiff was not entitled to the same for her separate use, then that the same might be transferred and paid to the Defendants, the trustees of the settlement of the 22d of *March* 1833, upon the trusts thereby declared, or that the Plaintiff might have a proper settlement out of the same as should be most beneficial to the Plaintiff.

On the 17th of *December* 1834, a *fiat* in bankruptcy was issued against *Thomas Paoli Hobart Johnson*, under which he was declared a bankrupt, and a supplemental bill was filed against his assignees.

The question was, whether the Plaintiff was entitled to have the fund transferred to her for her separate use under the trusts of the will; or whether her interest in the fund, notwithstanding the trust to her separate use, passed, by the act of marriage, to her husband.

Mr. *Pemberton* and Mr. *Chandless*, for the Plaintiff.

The ground, on which, it is presumed, the Defendants mean to contend that the Plaintiff is not entitled to have this legacy paid to her for her separate use, is, that as she was unmarried, when, by the death of the testatrix, the interest which she took under the will accrued o her, the trust to her separate use was inoperative, and

1837.

JOHNSON v. JOHNSON.

that interest passed, by the subsequent act of marriage, to her husband; and, in support of that view of the case, *Massey* v. *Parker* (*a*) will probably be cited. But *Massey* v. *Parker* has no application to the present case. The doctrine, laid down in that case, proceeds upon the principle that the incidents of property cannot be separated from the enjoyment, or the right to the enjoyment of it; that, property and its incidents being inseparable, the right of alienation cannot be restrained, unless there is a gift over, and that this principle applies as fully to the case of a female who is *sui juris*, as to that of a male. But there is nothing in the doctrine laid down in *Massey* v. *Parker*, to warrant the supposition that a female infant has the power of alienation. It is settled, that a woman cannot execute any deed during her minority, so as to bind her property and give it to her husband; and, if she cannot make a gift to her husband directly, *a fortiori* she cannot do it indirectly, by the act of marriage. In the present case, the Plaintiff was under age at the time when the instruments of *March* 1833 and *August* 1833, which purported to make a disposition of her property, were executed. Nothing passed by those instruments; and when she attained the age of twenty-one, at which time the trustees are required by the will to transfer the principal and accumulations to her sole and separate use, she filed this bill, thereby exercising her clear right of calling upon this Court to direct the execution of the trust.

Mr. *Teed*, for the issue of the marriage and the Defendant *Fell*.

According to the recent authorities, the husband became entitled, upon the marriage, to the interest which the

(*a*) 2 *Mylne & Keen*, 174.

1837.
JOHNSON v. JOHNSON.

the Plaintiff took under the will, and that interest passed by his assignment. Formerly, it was supposed that a gift might be made to an unmarried woman, under such limitations as to restrain alienation, and to take effect against the marital right upon her marriage. This is contrary to the principle of law upon which it has been held, that an attempt to make a gift, and at the same time modify the enjoyment of it, shall be unavailing; and the doctrine upon this subject has by a series of decisions been extended to all legatees and donees without reference to distinction of sex, except where females are the objects of the gift, and are under coverture at the time of the gift taking effect. A gift may be made to the separate use of a married woman, and she may be restrained from alienating it; but, as soon as she becomes *discovert*, she is freed from the restraint, and any attempt to extend the restriction upon the right of alienation to a future coverture will be ineffectual: *Barton* v. *Briscoe* (*a*), *Woodmeston* v. *Walker*. (*b*) The decision of the Vice-Chancellor in *Newton* v. *Reid* (*c*) shews that a bequest to the separate use of an unmarried woman, coupled with a clause against anticipation, could not prevail against the right of the legatee to join with her husband in an assignment of the fund so given for the benefit of her husband's creditors. *Massey* v. *Parker* (*d*) carries out the doctrine to its legitimate consequences, and the Lord Chancellor there expresses a clear opinion, that, where a legacy purports to be given in trust to the separate use of an unmarried woman, she may take it for herself or give it to any one, and, if she pleases, may give it by the act of marriage to her husband. The attempt to modify a gift of personal property to an unmarried woman

(*a*) *Jac.* 603.
(*b*) 2 *Russ. & Mylne*, 197.
(*c*) 4 *Sim.* 141.
(*d*) 2 *Mylne & Keen*, 174.

1837.

JOHNSON v. JOHNSON.

woman by limiting it to her separate use is inoperative, and the gift resolves itself into a simple gift to the donee.

There is no ground for the distinction here attempted to be taken, that the legatee was an infant at the death of the testator, and at the date of her marriage. An infant may contract marriage, and it follows as a necessary consequence of her capacity to contract marriage, that she may give to her husband all the rights which the law confers upon him in his marital character. The law gives him all her personal property, and, a limitation to the separate use of a single female being a nullity, the law gives him all the personal property attempted to be limited to her separate use. [*The* MASTER *of the* ROLLS. Is there any authority for the proposition that a female infant can give to her husband more by the act of marriage than she can give him by a deed?] There is no case, perhaps, directly establishing that proposition, but it follows, as a necessary consequence of her capacity to contract marriage during infancy, that infancy is no bar to her giving her husband, by the very act of marriage, all the property which the law vests in the husband by virtue of his marital right. The only question is, whether a testator or donor can defeat the husband's right by giving personal property, which passes to the woman before her marriage, to her separate use; and *Massey* v. *Parker* is an authority which shews that he cannot. The doctrine laid down in *Massey* v. *Parker* is not disputed on the part of the Plaintiff, and, if that doctrine be admitted, it is wholly immaterial whether the Plaintiff was of age or not when she intermarried with her husband, because, the trust to the separate use of the Plaintiff being inoperative, the husband became entitled upon his marriage to the interest which the Plaintiff took under the

the will. That interest was well assigned upon the trusts of the settlement, which operated by way of limitation of the husband's right; and the subsequent assignment for valuable consideration to the Defendant *Fell* was a valid assignment, so far at least as it was not inconsistent with the trusts of the settlement.

Mr. *James Russell*, for the trustees of the settlement.

It must be admitted that the decision of the Vice-Chancellor, in the last case in which this subject was discussed (*a*), is in direct opposition to the opinion given by the present Lord Chancellor, when Master of the Rolls, in the case of *Massey* v. *Parker;* and it is much to be lamented that the two branches of the Court should be in conflict upon a point of daily occurrence, and in which the interests of families are so deeply concerned. Assuming the opinion of the Lord Chancellor to be correct, the present case must be governed by the doctrine laid down in *Massey* v. *Parker*, unless it can be distinguished upon the ground that the interest given by the will to the Plaintiff was contingent, and did not take effect until she attained the age of twenty-one. If this distinction were admitted, it would only add to the confusion which already prevails upon this subject, and there is, in reality, no foundation for the introduction of such a distinction. The principle upon which the doctrine in *Massey* v. *Parker* is founded, is that, where a gift is made to a woman not under coverture, she takes it as absolutely as a male would take it, and the age of the woman, or the contingent nature of the gift, has nothing to do with the question of the validity of an attempt to limit the gift to her separate use. If a trust to the separate use of an unmarried

(*a*) *Davies* v. *Thornycroft*, 6 *Sim.* 470.

1837.

JOHNSON v. JOHNSON.

unmarried woman be invalid, property, upon which such a trust is attempted to be affixed, will pass to her as a simple gift of personal property, and as such will vest in her husband, subject, if there is no settlement, to the equity to which she is entitled in this Court, whatever be her age at the time of the marriage; and whether the interest which she takes in such a gift be vested or contingent, it passes equally by the act of marriage to her husband, subject to the wife's equity, or may be made, as in the present case, the subject of a settlement. A contingent interest will pass to the assignees of a bankrupt; and if property be given to a man, if he should attain twenty-one, and he commit a felony during his minority, the interest will pass to the Crown, and unless the felon be pardoned before the interest falls into possession, the Crown will take it absolutely. The husband, therefore, became entitled to this gift by the act of marriage, and his marital right cannot be affected by the distinction arising from the contingent nature of the interest.

Mr. *Pemberton*, in reply.

The point, upon which a strong opinion is expressed by the Lord Chancellor in *Massey* v. *Parker*, is that the power of alienation cannot be separated from the power of enjoyment, and that an unmarried woman, having the power of alienation, may exercise it by giving property by the act of marriage to her husband, notwithstanding any attempt to control the power of alienation by a gift of that property to her separate use. This is an extremely nice point, which has given rise to much discussion in the profession, and the decision of the Vice-Chancellor in the last case of *Davies* v. *Thornycroft* is, no doubt, opposed to the opinion of the present Lord Chancellor. But the point does not arise in this case, because the Plaintiff, being an infant, had not

not the power of alienation; and there can be no question here, as there might be in cases where the unmarried woman was of age, whether the act of marriage was or was not equivalent to alienation by deed. Nothing turns, in this case, upon the contingent nature of the interest; and it may be admitted that it is immaterial, so far as the point in *Massey* v. *Parker* is concerned, whether the interest were vested or contingent. If, for example, the gift had been to the Plaintiff, provided she attained the age of twenty-five, and she had married after attaining twenty-one, then the point upon which an opinion is expressed by the Lord Chancellor in *Massey* v. *Parker* would have arisen, and the contingent interest might well, according to that authority, have passed by the act of marriage to the husband.

The cases of *Benson* v. *Benson* (*a*), *Stiffe* v. *Everitt* (*b*), and *Tullett* v. *Armstrong* (*c*), were also referred to.

The MASTER *of the* ROLLS.

It is argued, on the part of the Plaintiff, that, taking the principle laid down in the Lord Chancellor's judgment in *Massey* v. *Parker* to be, that a woman to whose separate use property is given may, if she marries at a time when she has the power of alienation, give that property by the act of marriage to her husband, the point involved in that principle does not arise in the present case, because the Plaintiff married at a time when she had not the power of alienation, and consequently did not transfer the property by the act of marriage. If I shall be of opinion that the infancy of the Plaintiff at the time of her marriage does not take this case out of the rule, the general point is one of

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(*a*) 6 *Sim.* 126.
(*b*) 1 *Mylne & Craig*, 37.
(*c*) 1 *Keen*, 428.

1837.

JOHNSON v. JOHNSON.

so much importance that I shall consider it right to have this case re-argued.

On the following day his Lordship gave judgment as follows: —

I am of opinion that the general point does not arise in this case. The opinion of the Lord Chancellor expressed in *Massey* v. *Parker* seems to have been founded upon this; that the right and interest of the woman, to whose separate use the property was assumed to be given, were absolute before the marriage; that, the trustees holding the property absolutely for her, she might take it for herself or give it to any one, and there was no reason, therefore, why she might not give it by the act of marriage to her husband. In the present case, no one of these circumstances occurs. The estate and interest of the woman were not absolute before marriage; the trustees did not hold the legacy absolutely for her, and she could not take the legacy for herself or give it to any one. She could not, from her infancy, assign or dispose of her contingent interest; and when the legacy became vested and payable, that is, when she attained the age of twenty-one, and first acquired the right of disposing of the property, she was a married woman in whose favour, according to all the authorities, a trust for separate use will be valid. I could not decide against the validity of this trust in the events which have happened, without overruling the case of *Simson* v. *Jones* (*a*), which was decided by Sir *John Leach* upon much consideration. I consider that, when the Plaintiff attained her majority, she acquired an absolute interest in the legacy to her separate use, and that she is entitled, therefore, to have the fund transferred to her for her separate use, according to the prayer of the bill.

(*a*) 2 *Russ. & Mylne*, 365.

1837.

HUTCHINSON *v.* STEPHENS.

July 5.

A special application on the part of the Defendant to have a cause advanced and heard as a short cause, will be granted, unless the counsel for the Plaintiff will undertake to say that the cause is not a proper one to be so heard.

MR. *ROGERS*, on the part of the Defendant, moved for leave to have this cause advanced, and heard on the next day of short causes. A decree had been made at the hearing, and the cause had been set down to be heard for further directions. The present motion was opposed, but there could be no reasonable ground for resisting the application, as the decree to be taken at the hearing for further directions was quite of course, and the cause could not possibly occupy more time than the time usually allotted to the hearing of short causes.

Mr. *Tinney*, on the part of the Plaintiff, opposed the motion. An application to advance a cause had, in the late case of *Mountford* v. *Cooper* (*a*), been granted by his Lordship, where the Plaintiff was the party who made the motion, and it appeared that the sole object of the Defendant, in refusing his consent to have the cause set down as a short cause was to put off the time of coming to an account; but there was no instance in which a Defendant had ever claimed the right of setting down a cause as a short one, and the innovation attempted to be introduced by this motion would greatly interfere with the rights of suitors as hitherto recognised by the practice of the Court.

The MASTER *of the* ROLLS inquired whether Mr. *Tinney* could say that this cause was not proper to be heard as a short cause.

Mr.

(*a*) 1 *Keen*, 464.

1837.

HUTCHINSON v. STEPHENS.

Mr. *Tinney* said he was not prepared to say that it was not so, because, as the decree now stood, the decree to be taken on further directions could not be of a very complicated nature. But he submitted that there was no precedent for such a motion as that now made on the part of the Defendant; that what the Defendant asked was contrary to the established practice of the Court; that no instance could be shewn in which a Defendant had ever set down a cause or applied to have it set down as a short cause, and that this circumstance furnished of itself a strong ground for refusing such an application. The original foundation of the practice of setting down causes, as short causes, was arrangement between the parties, and until the recent order made in this Court in *Mountford* v. *Cooper*, there was no instance in which even the Plaintiff had been allowed to set down a cause as a short one without the concurrence of the Defendant's solicitor. In that case the Defendant was an accounting party, and the order of the Court was made under special circumstances which did not apply to the present case. But the practice introduced by his Lordship, even in cases where the Plaintiff, and not the Defendant, was the party who made the application, had not been followed in the other branch of the Court, for in a late case of *Ker* v. *Cusack*, where an application, similar to that of the Plaintiff in *Mountford* v. *Cooper*, had been made before the Vice-Chancellor, and the order made in that case was referred to, the Vice-Chancellor refused the application, and intimated that he considered the new practice not so convenient as the old one. Much inconvenience would arise if a different rule on this subject were to prevail in the two branches of the Court; and, unless the new practice were sanctioned by a general order of the Court, the suitor, if he did not appear, and a decree were taken against him, would be liable to

1837.

HUTCHINSON v. STEPHENS.

to suffer the consequences of default in one branch of the Court to which he would not be exposed in the other branch, where the ancient practice continued to prevail. The established rules of practice were presumed to be known to parties, but suitors could not be prepared for a new rule by which a cause was to be taken out of its turn, and set down, at the instance of one party only, to be heard as a short cause.

The MASTER *of the* ROLLS said he had in the case referred to, and in every case where a similar order had been made, called upon the counsel for the parties opposing the application, to say whether there was any thing in the cause in question, which rendered it improper to be heard as a short cause, and if counsel stated that it was not proper to be heard as a short cause, the Court relied implicitly upon the honour of counsel, and, upon such a statement, at once refused the application.

Mr. *Tinney* submitted that, upon motions of this kind, counsel could not be presumed to have examined the pleadings; and even if they had, and their opinion was unfavourable to the view of the case which they were called upon to support, there was considerable weight in an argument which had, on one occasion, been urged at the bar; and that was, that applications of this kind ought not to depend for their success upon the result of an appeal from the Court to the honour of counsel, which could of course be only answered in one way, and that way one which might be prejudicial to their clients. In the present case it was doubtful whether it might not be advisable to appeal against the decision pronounced at the hearing of the cause; and as the Plaintiff was abroad, and was not expected to return to this country until *August*, his solicitor

1837.

HUTCHINSON v. STEPHENS.

solicitor had no opportunity of communicating with him. If, therefore, the hearing for further directions were taken out of its course, and pressed on at the instance of the Defendant, the fund might be distributed in the Plaintiff's absence, and before he could be consulted as to the propriety of an appeal.

Mr. *Wright*, on the same side, said the Plaintiff in the original suit had himself no longer any interest in the cause, having become a bankrupt; but he was the father and next friend of an infant child in a supplemental suit, and that child had an interest in appealing against the decree. He forbore to say whether the cause, as it stood for further directions, was or was not proper to be heard as a short cause; but submitted that the course of proceeding, which the Defendant's motion called upon the Court to sanction, was not warranted by the practice of the Court, and ought not, therefore, to be allowed to the prejudice of the Plaintiff.

The MASTER *of the* ROLLS said that if he were to understand it to be stated by the counsel for the Plaintiff, that this was not a cause proper to be heard as a short cause, he should refuse the application.

Mr. *Tinney* said he might to this extent answer the question put by the Court; that, the Plaintiff being abroad, but expected to return in *August*, and it being doubtful whether the child of the Plaintiff had not an interest which would render it advisable to appeal against the decree, if, under these circumstances, he had been consulted by the solicitor for the Plaintiff, he should not have advised him to set down the cause as a short cause. He preferred, however, resting his opposition to the motion on the general practice of the Court.

The

The MASTER *of the* ROLLS.

1837.

HUTCHINSON v. STEPHENS.

I am obliged to Mr. *Tinney* for the candour with which he has expressed himself respecting the nature and circumstances of this particular cause, and for the zeal and ability with which he has argued against the expediency of the course which was adopted by me in the case of *Mountford* and *Cooper*, and other cases of a similar kind. There is no error so great as that of persevering in an error pointed out, and I hope that I shall always be open to conviction; but I did not adopt the course now observed upon without great consideration, and I am still so entirely persuaded of its expediency that until other arguments have convinced me that it is erroneous, or until I am corrected by a higher authority, I shall consider it to be my duty to adhere to it.

From the observations which have been addressed to me in this case, it seems that there is some mistake both as to the position of the causes in which applications of this sort have been granted, and as to what is meant in such cases by setting down causes to be heard as short causes.

According to the ordinary rule causes may be placed in the paper of short causes on the days appointed for hearing them, upon the certificate of the Plaintiff's counsel that they are proper to be heard as short causes, and with the consent of the solicitor for the Defendant; and this rule remains unaltered.

What I have done is to dispense with the consent of the solicitors of the Defendants on the counsel for the Defendants declining to say that the causes are not proper to be heard as short causes; and in order to judge

1837.

HUTCHINSON v. STEPHENS.

judge of the propriety of this course, it is necessary to notice particularly the state of the causes in which it is adopted. As to causes which have not previously been heard, the *subpœnas* have been duly served; the causes are regularly set down for hearing in the general paper; they ought to be in all respects ready for hearing; the days duly appointed for hearing them have elapsed: they would be called on for hearing immediately, if the Court were ready to hear them; and they are not called upon to be heard, only because other causes stand before them in the general paper, and are entitled in the usual course to be heard first. And as to causes which have been before heard, and are waiting for further directions, the same have (pursuant to the common orders made for the purpose and duly served), been regularly set down to be heard for further directions next after the causes already appointed; they ought to be in all respects ready for hearing, and would be called on to be heard, if the Court had disposed of the causes standing before them in the general paper.

The suitors, whose causes are thus ready to be heard, are delayed by want of power in the Court to dispose of the cases which stand before them; a state of things which I sincerely deplore, and from the severe pressure of which I have been, and am most anxious to relieve the suitors as far as I can.

There can be no doubt but that, generally speaking, the suitors who have priority in the paper are entitled to be first heard, and that a suitor whose cause stands early in the paper may justly complain, if a cause, which stands lower down, is advanced and heard first to his prejudice; and how constantly I am in the habit of protecting the interest of the suitors in this particular, must be known to all who attend to the course of business here.

1837.

HUTCHINSON v. STEPHENS.

But there are cases in which the interests of the suitors, whose causes stand low down in the paper, may be served without interfering in any material degree with the just claims of the suitors whose causes stand higher up. If there be two causes, one of which will probably occupy many hours, and the other only a few minutes in the hearing, the inconvenience, which arises from giving priority to the short cause, is very trifling to those interested in the long one, whilst the inconvenience to those interested in the short cause of waiting till the long one is disposed of may be very considerable; and considerations of this nature, together with the want of ability in the Court to dispose of all the causes as they become ready for hearing, gave rise to the practice of setting down causes to be heard as short causes, and appointing particular days for hearing them out of the turn in which they would have been entitled to be heard in the regular course. That which was to be guarded against in the practice was an improper interference with the just claims of the suitors, whose causes (not being short causes) could not, according to the principle on which the practice was founded, be heard out of their regular turn.

The Court has not of late years required parties, desiring to have their short causes heard on an early day, to present petitions for the purpose. The security required has been the certificate of the Plaintiff's counsel, and the consent of the Defendant's solicitor; and this is generally, though from the nature of the case it cannot always be, sufficient. It occasionally happens that when a cause, which has been set down as a short cause, is called on to be heard, it appears sometimes to the leading counsel for the Plaintiff himself, sometimes to the counsel for the Defendant or to the Judge, that the cause cannot properly be heard as a short cause,

1837.

HUTCHINSON v. STEPHENS.

and in that case it goes back into the general paper to be heard in its regular turn.

But while the security against setting down long causes to be heard in the short cause paper is generally sufficient, and, if not sufficient, may be made good when the cause is called on to be heard, an inconvenience of another kind has arisen.

Experience has shewn that in a great many cases where there could be no doubt that the cause was short, and would occupy very little time in the hearing, but in which the Defendant was called upon to account for, and to pay money, or to perform some other duty, the Defendant or his solicitor, without any reason shewing that the cause was not short, or ought not to be immediately heard, and might not be immediately heard without the least prejudice to the other suitors whose interests alone are to be attended to in this matter, has arbitrarily refused his consent, for the purpose of postponing the day on which the Defendant was to be compelled to pay the money or perform the duty, and perhaps also for the purpose of compelling a distressed Plaintiff to consent to an unjust compromise of his rights; and, in this way, suitors have been subjected to so much oppression that I thought it right to adopt the course which was taken in the case of *Mountford* v. *Cooper*, which happens to be reported, but which was not the first case, and is by no means the last in which I have made similar orders, and what has been done in these cases may be shortly expressed thus: — when the cause has been ready for hearing, and so short that it could be heard out of its turn without prejudice to the other suitors, the Court, in the absence of any reason against it, has appointed an early day for the hearing.

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1837.

HUTCHINSON v. STEPHENS.

It has been suggested, that it would be better that there should be a general order on the subject, and I incline to that opinion; but difficulties were found in framing a general order free from objection, and as there would necessarily be some exceptions to the application of any general order, and a contest might arise upon the question whether particular cases fell within the exceptions, and expense and litigation might occur to an amount as great or nearly as great as that occasioned by the application for an order in each particular case, and, under the circumstances, being desirous to prevent parties, who might (from the nature of their causes) be entitled to an early hearing, from being improperly and unnecessarily delayed by the arbitrary refusal of other parties, it occurred to me that the most convenient course would be to give the opposing parties an opportunity of stating the reasons, if any there were, why causes should not be heard as short causes; and if there were no such reasons, then to appoint a day for hearing them as such, or, in other words, to order them to be placed in the list of short causes on the day appointed for hearing short causes. I have accordingly made these orders only upon notice to the parties who have refused their consent to the cause being heard as short; and in every instance I have called upon the counsel representing those parties, to state whether they considered the cause proper to be heard as a short cause or not. I have asked this question with reference to and for the purpose of protecting the interests of the other suitors; and, if the counsel had stated that in their opinion the cause was not proper to be heard as a short cause, I should have reposed implicit confidence in their honour, and considered their statement as a sufficient reason to refuse the application. But in all the instances in which these orders have been made, it has appeared that the cause

1837.

HUTCHINSON v. STEPHENS.

could not be represented to be unfit to be heard as a short cause; and it is a satisfaction to me to think that, in all those cases, the orders which I have made have been the means of furthering the course of justice.

With respect to the task, which I may be considered to have imposed upon counsel, I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honourable and important services which they constantly perform as ministers of justice, acting in aid of the Judge before whom they practise. No counsel supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character as a man of honour, experience, and learning, but also by considerations affecting the general interests of justice. It is to these considerations that I apply myself; and I am far from thinking that any counsel who attends here will knowingly violate, or silently permit to be violated, any established rule of the Court to promote the purposes of any client, or refuse to afford me the assistance which I ask in these cases.

The present application, being made on the behalf of a Defendant, differs in that respect from those which have previously been brought under my consideration; but the difference does not appear to me to be material. There are cases in which the Plaintiff without any assignable reason, and therefore improperly, seeks to delay the hearing of the cause, and in which it is most important to the Defendant that a decision should be made; and considering the position of the cause, that

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1837.

HUTCHINSON v. STEPHENS.

it is in all respects ready to be heard upon further directions, and that both parties are waiting for a hearing, only because other causes are placed before them in the general list; that they are compelled to wait if they cannot be heard without prejudice to other suitors, but not compelled to wait, if the shortness of the cause enables the Court to hear them without prejudice to the other suitors, I see no sufficient reason why the application may not be made on the part of the Defendant, as well as on the part of the Plaintiff.

Not, therefore, considering the circumstance of the motion being made by the Defendant a sufficient ground for refusing this application, the only question is, whether there is any thing special in the present case which calls upon me to refuse the application. The counsel for the Plaintiff do not say that this is not in itself a proper cause to be heard as a short cause; but they say that this is a case in which they could not advise the Plaintiff's solicitor to set the cause down as a short one, in consequence of some extrinsic circumstances; and those extrinsic circumstances are, that the decree at the hearing may be appealed from, and that the Plaintiff is abroad and cannot at this moment be consulted by his solicitor. That, together with other circumstances, may afford grounds for not carrying the decree into execution immediately; and if it should, hereafter, appear that the solicitor is advised that it is a proper case for appeal, but that he cannot communicate with his principal, an application to stay the execution of the decree may not be unfavourably received. But that is a question to be considered on the proper occasion and in the proper manner, and cannot enter into the consideration whether this is a proper cause to be heard as a short one.

1837.

HUTCHINSON v. STEPHENS.

I am of opinion, therefore, that I ought to grant this application. At the same time I must consider the habits of solicitors, under the practice which has long prevailed, not to get ready their causes when they are at a certain distance in the list of causes, and that they ought not, while the rule now introduced may be imperfectly understood, to be taken by surprise; and, notwithstanding all that has passed at this discussion, if it should turn out that the cause is not proper to be heard as a short cause, it will be open to the counsel to say so, not with reference to the interests of individuals concerned in this cause, but with reference to the claims of other suitors of the Court. No suitor, whose cause is waiting to be heard, has a right to complain of its being advanced, though other suitors have a right to complain of causes being advanced to their prejudice. To-morrow being a short-cause day, let this cause be heard on the first short-cause day after to-morrow. (*a*)

(*a*) An application to discharge this order was made by Mr. *Wright* on the 10th of *July* to the Lord Chancellor, and refused. The Lord Chancellor, in refusing the motion, said he doubted whether he had any jurisdiction to interfere with the regulations made by the Master of the Rolls in the hearing of his own causes; and that, if he had, there appeared to be no ground for the application, inasmuch as the cause was ripe for hearing on further directions, and that hearing only delayed by the pendency of other business which had priority — as the leading counsel for the Plaintiff could not say that it was not a proper cause to be advanced—and as, if it could be advanced without prejudice to the other suitors, the parties to the cause had no right to complain of its advancement, for it would be strange to say that they had a vested interest in the unavoidable delays of the Court.

The case of *Ker* v. *Cusack*, referred to in the argument upon this motion, is now reported in 7 *Simons*, p. 520.

1837.

CAMDEN *v.* BENSON.

July 5.

Where an estate was sold under a decree of the Court, and one of the conditions of sale was, that the purchaser pay the purchase-money into Court on a given day, at his own expense, it was held, that the purchaser was entitled to the costs of a reference as to the title reported good by the Master.

THE purchaser of an estate, sold under a decree of the Court, obtained the usual reference as to the title, and the Master reported that the title was good. One of the conditions of sale was that "the purchaser pay the purchase-money into Court, on or before the 4th day of *June*, under an order to be obtained by the purchaser at his own expense." That condition not having been complied with,

Mr. *James Russell*, for the vendor, moved that the purchaser be ordered to pay the purchase-money into Court, and also the costs of the reference of title and of the motion for the reference, and the costs of this application. He contended that, if a purchaser of an estate, sold under a decree of the Court, objected unreasonably to the title, he could not throw the costs of a reference upon the estate, and here the condition of sale, subjecting the purchaser even to the costs of the order to be obtained for the payment of the purchase-money into Court, implied that, if he obtained a reference as to the title which the Master's report shewed to be unexceptionable, it must be at his own expense.

Mr. *Stuart*, *contrà*, said the purchaser must of course pay the costs of this application, but as to the costs of the reference of title, a purchaser under a decree of the Court stood exactly in the same situation as any other purchaser; and he cited the cases of *Friswell* v. *Moore* (*a*) and *Dallas* v. *Powell* (*b*), where the estates were sold under

(*a*) *May* 30th 1833. (*b*) *August* 1833.

1837.

CAMDEN *v.* BENSON.

under decrees of the Court, and, the titles having been reported good, the Vice Chancellor refused similar applications to make the purchasers pay the costs of the references of title. The Court did not warrant the title when it directed a sale, and the purchaser was, therefore, entitled to the usual investigation before the Master, at the expense of the estate.

The MASTER *of the* ROLLS.

The purchaser must pay the costs of this application, but he is entitled, according to the practice of the Court, to the costs of the motion for a reference of title, and to the costs of that reference.

1836. *Nov.* 30. *Dec.* 2. 1837. *Jan.* 13.

NEALE *v.* NEALE.

A. and *B.*, having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, *A.*, the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands. *A* was, in fact, at the time of this agreement, tenant in tail under the limitations of a surrender made by his grandfather; and, after *A.*'s death without issue, *B.*, having discovered his own title as tenant in tail, repudiated the agreement, and brought an action of ejectment to recover the whole estate.

On a bill filed by the devisee of *A.*, the Court, upon the principle on which it supports family arrangements, decreed *B.* to do all necessary acts to bar the entail, and vest the parts of the lands, allotted under the agreement to *A.*, upon the trusts of *A.*'s will.

THE bill was filed by *Daniel Neale* and others, claiming under the will of *James Neale*, against *Joseph Neale*, the brother of the deceased *James Neale*, and two other persons, one of whom, *Marsh*, was an incumbrancer of the Plaintiff *Daniel Neale*, and the other a legatee under the will of *James Neale;* and it prayed that *Joseph Neale* might be compelled to do and concur in such acts as were necessary for barring the entail of the copyhold estate in question, and specifically to perform

1836.

NEALE v. NEALE.

form an agreement for the division of that estate between himself and his deceased brother *James Neale;* and, if the Court should be of opinion that the Plaintiffs were not entitled to that relief, then for an account of the rent of a portion of the estate possessed or occupied by the Defendant *Joseph Neale* for some time previous to the death of his deceased brother *James Neale.*

The estate in question was the subject of a settlement made by *Joseph Neale*, the elder, the grandfather of the Defendant *Joseph Neale* and his deceased brother *James*, in the month of *May* 1747. Being then absolutely entitled, *Joseph Neale*, the elder, made a surrender to the use of himself for life, remainder to his wife *Mary* for life, remainder to the heirs of her body by himself for life, remainder to himself in fee.

On the death of *Joseph*, the elder, which happened in the month of *November* 1753, *Mary Neale*, his widow, became tenant in tail in possession under the settlement; but she was, by mistake, admitted to the copyhold estate as tenant for life only, and *James Neale*, her eldest son, and the father of the Defendant *Joseph* and his deceased brother *James*, in the lifetime of his mother, and in *November* 1794, surrendered the reversion or remainder, supposed to be expectant after her death, to the use of himself for life, remainder to his wife *Unity* for life, remainder to such persons as he should by will appoint; and he then made a will, by which he devised the estate, subject to the life interest of *Mary* his mother, and the life interest of *Unity* his wife to his two sons, *James* and *Joseph*, their heirs and assigns, for ever; and he soon afterwards died.

Mary Neale, the mother, died in *March* 1800, leaving three grandsons, *James Neale*, the Defendant, *Joseph Neale*,

1836.

NEALE v. NEALE.

Neale, and *Daniel Neale*, surviving her; *James*, as her eldest son, being the person really entitled to the estate, under the surrender of *Joseph Neale*, the grandfather.

Under the surrender of *James Neale*, the elder, *Unity*, his widow, appeared to have an estate for life, with remainder to her two sons, *James* and *Joseph ;* and, under this apparent title, *Unity* took possession. She some time afterwards married *James Day ;* and *Day* and his wife were admitted under the will of *James Neale*, the elder.

After the death of *Unity Neale*, and on the 8th of *February* 1821, *James Neale*, the brother of *Joseph*, who was really entitled as tenant in tail, and the Defendant *Joseph Neale*, who appeared to be entitled under the will of *James Neale*, the father, were admitted as tenants in common in fee. It appeared that *James*, who was an idle and extravagant person, and in some degree dependent upon his brother *Joseph*, entertained some suspicion, and at times insisted that his father had no right to make a will, and in this state of things they came to an agreement with each other for a partition of the estate in the month of *March* 1821. In discussing the terms of this agreement, which was not committed to writing, it was proposed by *James* that *Joseph* should take, as his half, certain closes called *Meer Ditches* and *Newlands*, containing together 14 acres ; and that *James* should keep the rest, amounting to $16\frac{3}{4}$ acres, for his share. To this *Joseph* objected on account of the inequality ; and, upon this difference, their younger brother interposed, and proposed that, in addition to the 14 acres, *James* should give up to *Joseph* an orchard called the *Ridge*, containing $\frac{3}{4}$ of an acre; and both *James* and *Joseph* having acceded to this, it was finally agreed that *Joseph* should have as his share

Meer

1836.

NEALE v. NEALE.

Meer Ditches, *Newland*, and the *Ridge*, containing in all 14¾ acres; and that *James* should have the remaining 16 acres as his share. The difference in quantity was 1¼ acre; and with reference to this difference the Defendant *Joseph*, by his answer, stated that, being unwilling to enter into any legal contest with his brother, touching the proportion of his half of the property, and at the same time being influenced by repeated assertions made by his brother that the whole of the property was his, and that his father had no right to make a will, he was induced to consider, and during the life of *James* did consider the arrangement and agreement as finally settled and agreed between them.

This agreement having been made, the parties severally took possession of the shares allotted to them; and they dealt with and enjoyed them separately during the life of *James*, and for some time afterwards.

On the 6th of *April* 1824, *James Neale* made his will, and thereby devised his share of the estate to the Plaintiff *Daniel Neale*, subject to various charges in favour of the other Plaintiffs, and of the Defendant *Joseph Neale*.

James Neale died on the 24th of *January* 1830 without issue, leaving *Joseph* his elder brother, his heir, and the heir of the body of his grandmother *Mary* by *Joseph* her husband, and consequently tenant in tail of the copyhold estate under the limitations of the copyhold estate created by the surrender of the 14th of *May* 1747. Some time after the death of *James Neale*, his devisee, *Daniel Neale*, having occasion to raise money by mortgage of the estate, found that he could not do so without exonerating it from the charges created by the will of *James*, one of which was a legacy of 60*l*., payable

1836.

NEALE v. NEALE.

payable to the Defendant *Joseph*, who, upon receiving a promissory note for the sum, at the request of *Daniel*, released the estate from the charge.

During this time no question, respecting the agreement of 1821, or as to the title of the estate, had arisen; but in 1832, *Joseph Neale*, the Defendant, produced a copy of the surrender of *May* 1747, and claimed to be entitled to the entirety of the estate under the limitations, which had never been barred, and, his claim being resisted, he brought an action of ejectment to recover possession of that share which was allotted to *James Neale* in 1821.

Upon that action being brought, the present bill was filed; it charged that the copy of the surrender of *May* 1747, was from the year 1801 in the possession of *Joseph Neale*, who knew the contents and effects thereof, but concealed the same from *James Neale*.

The Defendant *Joseph Neale*, by his answer, denied all knowledge of the copy of the surrender until it was found, in the year 1832, by his son, amongst other papers, in one of the top drawers in a chest of drawers in the bed-room of the Defendant *Joseph Neale*'s house at *Park Milk Farm*.

It appeared by the evidence that in *March* 1801, when *Unity Neale* intermarried with *Day*, she left the house which she then occupied in the possession of the brothers, *James* and *Joseph Neale*, and that among the furniture in that house was an old writing desk which had belonged to *James Neale*, the father, and which contained a number of papers in one of the drawers. Shortly afterwards the brothers *James* and *Joseph* entered into partnership; and they continued to occupy the

the house until *July* 1809, when the partnership was dissolved, and *Joseph* became the sole tenant of the house, *James*, however, continuing to live with him as a lodger. The desk was valued among other furniture, and taken by *Joseph*, and considered as his property. *Joseph* left the house in the year 1816, and took the desk with him; he returned to the house in 1820, and brought the desk back with him. During all this time *James* lived with him as a lodger. The drawer which contained the papers was sometimes locked, and sometimes left open. In 1828 Captain *Newman*, a friend of the Defendant *Joseph*, wished to borrow the drawer for the purpose of keeping powder in it, and the papers were then removed from the drawer, and placed in a chest of drawers in an upper room where the copy of court roll was found by the son of the Defendant *Joseph Neale* in *June* 1832. In *December* 1832, the Defendant *Joseph Neale* laid the copy of court roll before his solicitor, and shortly afterwards brought the action of ejectment.

Mr. *Tinney*, and Mr. *John Romilly*, for the Plaintiffs.

There is strong reason for believing that the Defendant *Joseph Neale* knew that the copy of court roll was in his own possession at the very time when he entered into the agreement with his brother *Joseph*. So long as it was his interest to suppress the deed, and support the agreement, the deed was not forthcoming; but when it became his interest to rescind the agreement, and claim a title to the whole estate, the deed was produced. Even if the Court should be of opinion that the charge of direct fraud and concealment is not sustained, it will imply knowledge of the existence of the instrument in such a case as this, and will not permit a party to say that he is not cognisant of a deed in his own possession, when it is to his interest to deny the knowledge

1836.

NEALE v. NEALE.

knowledge of it, and when the instrument is either not forthcoming, or is brought forward exactly at the times when it is for the interest of the party possessing it, that it should be kept back or produced. Where it is the interest of a party to deny knowledge of a fact, which he had the opportunity of knowing, the Court will, in the absence of proof, presume knowledge, because it is too dangerous to permit so strong a temptation to a denial of the truth. Thus, in *Bulkley* v. *Wilford* (*a*), where a solicitor, who was the heir at law of his client, advised his client to levy a fine, and alleged that he did not know that levying a fine operated as a revocation of a will, the Court presumed knowledge on the part of the solicitor, and would not allow such a defence to prevail.

But, supposing knowledge of the instrument on the part of the Defendant *Joseph Neale* to be neither established nor capable of being presumed, the agreement between the brothers to give effect to the dispositions made in their father's will, and to settle amicably all matters in dispute or doubt between them will, upon the recognised principles of this Court, be effectual as a family arrangement: *Stapilton* v. *Stapilton*. (*b*) A compromise of a doubtful right is a sufficient foundation in equity for such an agreement, and the Defendant admits by his answer, that he consented to an inequality of partition on the ground of the doubt which, at the time of the arrangement, hung upon his apparent title. The Defendant was ready to take all the advantage of the mistake under which the agreement was entered into when it operated against the rights and interest of his brother, and cannot now be permitted to repudiate the agreement when his own rights and interest are affected by its

(*a*) 2 *Clark* v. *Finell.* 102. (*b*) 1 *Atk.* 2.

its enforcement. The Court always looks to the fairness and reasonableness of the agreement in these cases, and, if fair and reasonable at the time it was entered into, will not permit an agreement to be rescinded, because in its origin, it was founded on a mistake of the rights of the parties, or because in the result it turns out to be more advantageous to one party than to the other: *Pullen* v. *Ready* (*a*), *Cann* v. *Cann* (*b*), *Cory* v. *Cory* (*c*), *Wycherley* v. *Wycherley* (*d*), *Stockley* v. *Stockley* (*e*), *Gordon* v. *Gordon* (*g*), *Tweddell* v. *Tweddell* (*h*), *Clifton* v. *Cockburn*. (*i*) It is no valid objection to this agreement, that it was not committed to writing. In *Stockley* v. *Stockley* (*k*), a parol agreement which was entered into as a family compromise of doubtful rights was decreed to be specifically performed; and in *Thomas* v. *Gyles* (*l*), a parol partition between tenants in tail was supported. Another ground upon which the Plaintiffs are entitled to the relief sought by this bill, is that the Defendant *Joseph* has now acquired a title, though he had none when he entered into the agreement; and a court of equity, under such circumstances, will compel a party to make good the title which he agreed to give as soon as he is able to do so: *Morse* v. *Faulkner*. (*m*)

Mr. *James Russell*, for the Defendant, *Marsh*, the incumbrancer.

Mr. *Pemberton*, and Mr. *R. P. Chichester*, *contrà*.

This is a case of great singularity in its circumstances, and it must be admitted to be a case so full of suspicion, that

(*a*) 2 *Atk.* 587.
(*b*) 1 *P. Wms.* 723.
(*c*) 1 *Ves.* sen. 19.
(*d*) 2 *Ed.* 175.
(*e*) 1 *V. & B.* 23.
(*g*) 3 *Swanst.* 463.
(*h*) 1 *Turn. & Russ.* 1.
(*i*) 3 *Mylne & Keen*, 76.
(*k*) 1 *V. & B.* 23.
(*l*) 2 *Vern.* 232.
(*m*) 1 *Anst.* 11., and more fully in 3 *Swanst.* 429.

1836.

NEALE
v.
NEALE.

that it undoubtedly calls for the minutest investigation. A deed is produced after a great lapse of years, during which it appears to have been in the possession of the Defendant, and it is produced at a time when it is for the interest of the Defendant that it should be forthcoming. It cannot be denied that such a case should be sifted with the greatest jealousy; it has, in fact, been subjected to the most rigid investigation, and the result is, that every allegation in the bill which imputes fraud to the Defendant *Joseph Neale* is completely rebutted by the evidence. Fraud being rebutted, there is no principle of legal or technical, or even of moral equity upon which a decree can be made against the Defendant. The Plaintiff rests his claim to relief upon two grounds; first, that the Defendant *Joseph Neale*, being in possession of the deed, and aware of his brother's title as tenant in tail, fraudulently concealed it, during his brother's life, in order to prevent him from acquiring an absolute interest in the property, and that he cannot be permitted to set up this deed after his brother's death, and thereby acquire an advantage by his own wrong. Secondly, it is argued that independently of any question of fraud, this is a family arrangement entered into for the purpose of settling differences between the parties, and, therefore binding, in this Court, upon their respective rights. The allegation that there was a fraudulent possession of the deed on the part of the Defendant *Joseph* is completely displaced by the evidence. It appears that the desk containing the deed was open to the inspection and examination of every body for thirty years. There is the positive denial of the Defendant *Joseph Neale*, in his answer, that he knew of the existence of the deed until its discovery by his son in the year 1832. Against the positive statement of the answer, which is made evidence by the Plaintiffs themselves, the Court is nevertheless called upon to disbelieve

lieve that evidence, because, it is said, the Defendant is not a credible witness. And why not a credible witness? because it is alleged that he is insisting upon his legal rights against moral justice; as if the exercise of a right, the abstaining from which might be considered as an act of romantic folly, were to deprive a party of all credibility. There is no foundation for the proposition, that the Court will presume fraud from the mere fact of the possession of an instrument, where it is not produced until a time at which it is for the interest of the party producing it that it should be forthcoming. The case of *Bulkley* v. *Wilford* establishes nothing but this, that a man shall not derive any advantage to himself by pleading ignorance of that which he must be presumed as a person of ordinary skill in his profession to know. If knowledge of the instrument must be inferred from the mere fact of possession, *James* as well as *Joseph* must be taken to have been cognisant of its existence, for the possession was common for many years to both brothers, legally so until the dissolution of the partnership, and, practically, and for all purposes affording the opportunity of inspection, for many years afterwards.

But it is said that, even if there were no fraud, the agreement may be supported upon the principle of family arrangement, whether founded in error or not. It is not pretended that *Joseph* ever agreed to give up any thing beyond the difference between the moiety of the property and the portion which he consented to take. He never agreed to abandon any right which he might thereafter acquire, and which was neither in his own contemplation nor in that of the party with whom the agreement was made. In most of the cases which have been cited the parties had a full knowledge of all the circumstances enabling them to enter into a compromise. This was the case in *Pullen* v. *Ready*, *Wycherley*

1836.
NEALE v. NEALE.

cherley v. *Wycherley*, and *Stockley* v. *Stockley*. An agreement to alter the rights of parties in respect of an interest in real estate cannot be made by parol; neither is there any foundation for the proposition that a partition can be made by parol. The case cited in *Thomas* v. *Gyles* as an authority for the proposition inserted in the marginal note, that a partition between tenants in tail, though only by parol, shall bind the issue, is not law.

Mr. *Tinney*, in reply.

1837.
Jan. 15.

The MASTER *of the* ROLLS, (after stating the facts:)

If there were such knowledge and such concealment as are charged by this bill, there can hardly be a greater fraud than that which was committed by the Defendant *Joseph Neale*.

The circumstances are no doubt attended with very great suspicion; but, after reading the charges and the answer with the very little evidence really bearing on the question, it does not appear to me that I can safely and satisfactorily impute to the Defendant a knowledge of the copy of the court roll, before the time when he says it was found. He most positively denies it. His conduct in *December* 1830, almost a year after the death of *James*, appears to me to be inconsistent with it, and however extraordinary it may seem that such a document should have been so long in his possession unexamined and unknown, yet in the station of life of these persons, their extreme negligence or want of curiosity may perhaps be accounted for, and I can hardly say that the nature of the case is such as to make it fit for a

court of justice to presume a knowledge in the absence of proof.

1837.

NEALE v. NEALE.

But considering him to have been ignorant of this copy of court roll during the life of his brother *James*, the question remains, whether he is not bound by the agreement of 1821. It does not appear to me that the agreement merely related to the mode of enjoying the estate, or had reference only to a partition. *Joseph* did not so consider it; he knew that *James* thought himself entitled to the whole estate, and he himself, influenced, as he says, by the assertions of *James*, and desirous to avoid litigation, consented to accept less than half. This then is not a simple agreement for equality of partition; it is an agreement for partition with compensation for abandoning a supposed right and a claim. Upon what that supposed right depended does not appear; but that there was a supposed right of *James* to some extent yielded to by *Joseph* is clear, and, if it be considered that the right, which to the parties themselves at that time was only supposed, had a real foundation, which might have been verified either by production of the document then in the possession of *Joseph*, or by searching the court rolls of the manor; that, if *Joseph* had not made the concession which he did, *James*, instead of consenting to the agreement, might have investigated the title, and proved that the whole estate was his own, it will appear that the concession, however trifling in itself, placed the parties in a situation very different from that in which they might otherwise have stood; and looking at this case with reference to those principles deducible from the several cases cited at the bar, I am of opinion that the agreement, though parol, yet being in the nature of a family arrangement and followed by the uninterrupted several enjoyment of the

1837.

NEALE
v.
NEALE.

portions allotted to the two brothers respectively, is an agreement which this Court will enforce.

Decree the Defendant to do all acts for barring the entail, and for vesting those parts of the estate, which were allotted to *James*, in the Plaintiff *Daniel* on the trusts of the will, and subject to the mortgage to *Marsh*.

No costs of so much of this suit as seeks to charge the Defendant *Joseph* with a knowledge of the copy of court roll before *May* 1832; the Plaintiff to pay the costs of *Marsh*; the costs of the Plaintiff, other than those mentioned, to be paid by the Defendant *Joseph*.

This decision was appealed from, and affirmed by the Lord Chancellor on the 11th of *July*.

1836.

GILES *v.* GILES.

PENFOLD *v.* PENFOLD.

1836. *Nov.* 9.

A testator bequeathed the residue of his estate to his wife *A. G.* for her life, and the legatee, describing herself as *A. G.* widow, filed a bill against the executors for the administration of the estate; but, it appearing that *J. P.*, the first husband of the legatee, was living at the time the ceremony of marriage was performed between her and the testator, and at the time of filing the bill, she filed a supplemental bill, describing herself as *A.. P. alias A. G.*, by her next friend, against *J. P.*, for the purpose of making her husband a party to the suit:

Held, that this was not such an alteration of the frame of the record as to render the evidence taken in the first cause inadmissible at the hearing of the two causes; and that the amended description of the Plaintiff in the supplemental bill could not affect the liability of a witness examined in the original suit to be indicted for perjury, if he swore falsely.

A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights.

THOMAS GILES, by his will dated the 26th of *November* 1830, gave all his real and personal estate to his brother *Jeremiah Giles* and *John Buckton* upon trust to sell his real estate, and out of the produce of such sale to pay off any mortgages which might be due at the time of his death, and to invest the residue of such produce and of his personal estate, after payment of his debts and legacies, in trust for his wife *Ann Giles*, for and during the term of her natural life, as a *feme sole*, and not liable to the debts, assignment, or control of any husband or husbands; and whose receipt alone, notwithstanding any coverture, should be a legal and good discharge to his trustees, to the intent that the yearly interest, dividends, and profits, might be a provision for the personal maintenance and support of his said wife *Ann* during her natural life; and that the same or any part thereof should not be subject to any claim whatever, or to any sale, alienation, charge, or incumbrance: and after her decease, in trust for his brother

1836.

GILES v. GILES.

brother *Jeremiah Giles* during the term of his life: and after his decease, for the only proper use and benefit of the three children of his said brother. And the testator appointed *Jeremiah Giles* and *John Buckton* executors of his will.

The testator died on the 5th of *April* 1831, leaving the Plaintiff, described in his will as his wife *Ann Giles*, surviving him; and his will was proved by the executors named therein.

In the year 1834, the Plaintiff, describing herself as *Ann Giles*, widow, filed her bill against the executors and trustees, and against the children of *Jeremiah Giles*, praying that the testator's will might be established, and the trusts thereof performed, and that the usual accounts might be taken of his personal estate; and that the clear residue of the trust monies might be ascertained and invested for the benefit of the Plaintiff during her life. The bill alleged that the Defendants sometimes pretended that *John Penfold*, the first husband of the Plaintiff, was living at the time when the Plaintiff intermarried with the testator, and that, the Plaintiff not being the testator's wife, the bequests to her were void; whereas the Plaintiff charged the contrary, for that *John Penfold* was dead at the time of such intermarriage: and that even if *Penfold* were living, the same ought not to prejudice the Plaintiff's right under the will, inasmuch as she practised no fraud or imposition on the testator. The Defendants by their answer said, they were informed and believed, that in the year 1817, when the ceremony of marriage was performed between the Plaintiff and the testator, *John Penfold* her husband was living; and that he still was, at the date of their answer, living.

The

1836.

GILES v. GILES.

The Defendants went into evidence, by which it appeared that a deed of separation, dated the 2d of *March* 1815, was prepared between *John Penfold* of the first part, *Ann Penfold* his wife of the second part, and the testator *Thomas Giles* and another trustee of the third part; that the testator was cognisant of such deed, though he did not execute it, and that *John Penfold* was still living. Under these circumstances, when the cause came on to be heard on the 15th of *December* 1833, it was directed to stand over for the purpose of making *Penfold* a party; and a supplemental bill was filed by the Plaintiff, described therein as *Ann Penfold* alias *Giles*, by her next friend, against *John Penfold*.

The original bill and supplemental bill now coming on to be heard together, and it being proposed to read the evidence in the original suit, it was objected, on the part of the Defendants, that the title of the record and the character in which the Plaintiff now sued were so entirely altered, that this evidence could not be received; and the case of *Milligan* v. *Mitchell*, before the present Lord Chancellor (*a*), was cited as an authority in support of that proposition. The Plaintiff having originally sued in a false character, the depositions taken in the original suit must be considered as depositions in a cause which had no longer any existence; and, if the witnesses swore falsely, it would be impossible to indict them for perjury.

For the Plaintiff it was insisted that there was no ground for this objection, which was raised only for the purpose of defeating the justice of the case and still further delaying the satisfaction of the bequest to which the Plaintiff was entitled under the will of the testator,

(*a*) 1 *Mylne & Craig*, 433.

1836.

GILES v. GILES.

testator, of which she had received no part for six years; that this case had no analogy to that of *Milligan* v. *Mitchell*, where several new Plaintiffs were introduced into the amended bill, new allegations made, and the whole frame of the record entirely changed. Here the parties to the original cause continued the same; the change in the title of the cause, rendered necessary by the discovery of a new fact, did not substantially affect the identity of the cause; and nothing was done by the supplemental bill but to state the new fact, and make *Penfold* a formal party, against whom no evidence was required beyond that already taken in the original suit.

Mr. *Kindersley*, Mr. *Chandless*, Mr. *Skirrow*, and Mr. *Richards*, in support of the objection.

Mr. *Pemberton* and Mr. *James Parker*, *contrà*.

The MASTER *of the* ROLLS decided that the evidence should be received. This case was distinguishable from *Milligan* v. *Mitchell*, because in that case several new parties were introduced, and the frame of the record was essentially altered. An amendment, such as that introduced into the supplemental bill, would not render a witness, if he swore falsely, less liable to an indictment for perjury.

The facts, established by the evidence, were that both the testator and the Plaintiff knew that *John Penfold* was living in 1815; that they performed the ceremony of marriage in 1817; that the testator and the Plaintiff lived together, and were considered as husband and wife, and that the testator believed her to be his lawful wife at the time of his death; and that the Defendant *Buckton*, who was the testator's solicitor, knew that *Penfold* was living when he drew the testator's will.

Mr.

1836.

GILES v. GILES.

Mr. *Pemberton*, and Mr. *James Parker*, for the Plaintiff.

There is no pretence for the resistance which has been made to the payment of the Plaintiff's legacy, unless it could be shewn that fraud had been practised upon the testator; and fraud is neither alleged nor proved. The mere fact of a false description is perfectly immaterial, unless fraud can be connected with it. The testator in his will calls the Plaintiff his wife, and believed her to be so; he and the Plaintiff lived together as husband and wife, were so reputed and recognised, and there was exactly the same motive for the testator's bounty, as if she had actually filled the character of his lawful wife. In a case where a testator, contemplating marriage with a lady, bequeathed a legacy to her in his will under the description of his wife, and died before the marriage took effect, the legatee was held to be entitled to the legacy; *Schloss* v. *Stiebel* (*a*). In that case it might have been considered as doubtful whether the testator did not regard his marriage as a condition precedent to the gift, and whether he intended the legatee to take, if she did not fill the character which he had by anticipation attributed to her. Here no such doubt can be raised as to the intention of the testator. In *Standen* v. *Standen* (*b*) it was held that a wrong description will not defeat a legacy given to a legatee, where there is no doubt as to the object of the testator's bounty. The single exception of fraud proves the rule. Thus, in *Kennell* v. *Abbott* (*c*) the legatee had committed a gross fraud by performing the marriage ceremony with the testatrix, who died in ignorance that he was the husband of another woman; and it would be contrary to

(*a*) 6 *Sim.* 1.
(*b*) 2 *Ves.* jun. 589.
(*c*) 4 *Ves.* 802.

1836.

GILES v. GILES.

to all law and moral justice to allow a man to take advantage of his own wrong, and receive a benefit from the person whom he had defrauded. In this case the testator had exactly the same opportunity of ascertaining that *Penfold* was alive as the Plaintiff; and the knowledge or suspicion, if any, that he was living must have been common to both of them. Fraud, therefore, is out of the question; and the Plaintiff is clearly entitled to the benefit of the bequest.

Mr. *Skirrow*, Mr. *Kindersley*, Mr. *Richards*, and Mr. *Chandless*, *contrà*.

It is admitted that, if the Plaintiff has been guilty of fraud, she cannot sustain this suit. Now, although direct fraud has not been proved, the Court will infer fraud where a party does an illegal or criminal act, the consequence of which is to deceive another person. The Plaintiff performed the marriage ceremony with the testator at a time when, if she did not actually know, she had every reason to believe, that her first husband was living. She committed the offence of bigamy; and this criminal act had the effect of imposing upon the testator, for it is the foundation of the argument on the other side that the testator believed her to be his lawful wife. The principle of the civil law laid down in that passage of the Digest which was quoted in *Kennell* v. *Abbott*, and which governed the decision of that case, is applicable to the present case: *falsam causam non obesse legato, quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.* (*a*) The question is, was the testator or was he not deceived by the act which clothed the Plaintiff

(*a*) *Dig.* lib. 35. tit. 1. l. 72. s. 6.

tiff with a false character, in which false character he makes her his legatee? If he was deceived — and this is not denied — the Plaintiff can take no benefit under this bequest.

Mr. *Pemberton*, in reply.

There is nothing, either in the facts or in the law of this case, upon which any reasonable doubt can be raised. The utmost the facts go to prove is, that the Plaintiff and the testator intermarried without having sufficiently ascertained whether the husband of the Plaintiff was or was not living. They had both the same opportunity of ascertaining that fact; whatever immorality is attributable to one, is equally attributable to the other. As to the test laid down in the Digest for trying the validity of a legacy given to a person in a false character, it would wholly fail, if applied to this case. That test is, that, if it be proved that the testator would not have given the legacy if he had known the true character of the legatee, the legacy will fail. Here it is not only not proved, but there is not the least reason to suppose that, if the testator had known that *Penfold* was living, he would not have given the legacy. The motive for the gift was clearly independent of that fact; and the case resolves itself, therefore, into a case of mere misdescription.

The MASTER *of the* ROLLS.

In this case the testator, by his will, gives a legacy to his wife *Ann Giles*; and the Plaintiff, describing herself as *Ann Giles*, widow, files a bill against the executors and trustees of the testator to recover payment of that legacy. The defence is, that the Plaintiff does not answer the description which the testator has, in his will,

1836.

GILES v. GILES.

will, applied to her, for that she is not, in fact, the widow of the testator; and it appears, by the evidence, that the Plaintiff does not, in point of fact, answer that description, and that, at the time when the ceremony of marriage was performed between the testator and the Plaintiff, she was the wife of another person. The Plaintiff alleged, by her bill, that *Penfold*, her first husband, was dead at the time when that ceremony of marriage took place between her and the testator, but it was proved that *Penfold* was at that time and still is living; and a supplemental bill was filed, with leave of the Court, for the purpose of bringing *Penfold* before the Court as a party.

It is clear that, in point of law, a mere misdescription of a legatee will not defeat the legacy; and it is equally clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect. That was the principle upon which the case of *Kennell* v. *Abbott* was decided, and the soundness of that decision has never been questioned. In this case it is said that, though no fraud upon the testator is proved, fraud must be inferred, because, in point of fact, an offence was committed by the Plaintiff, who, knowing that her first husband was living in 1815, married the testator in 1817; and it is argued that the testator could not know, and the Plaintiff must be assumed to know, that her first husband was living. The reason assigned why the testator could not know it is, that he had some religious scruples as to his conduct before the marriage, and that those religious scruples must have been removed before he consented to marry; and the ground upon which the Court is to infer that the Plaintiff did know that fact is, that there is evidence of *Penfold* being known to be alive

1836.

GILES v. GILES.

in the year 1830. This is an inference which I cannot follow: I cannot assume, from the facts of the case, that the Plaintiff had a guilty knowledge which the testator had not in common with the Plaintiff. If I could assume that, the case would be very like that of *Kennell* v. *Abbott;* but in the present case the testator, as well as Mrs. *Penfold*, had both an actual knowledge of the existence of *John Penfold* in the year 1815; and it was not more the duty of Mrs. *Penfold* than it was the duty of *Thomas Giles*, the testator, to ascertain that *John Penfold* was dead before they ventured to proceed to the ceremony of a marriage between themselves. There is no more reason why I should impute to the Plaintiff a fraud upon the testator than to the testator a fraud upon the Plaintiff; which of them was guilty, if either of them, must depend upon circumstances which are not before the Court. If both had a guilty knowledge, no fraud was committed upon the testator; and however immoral the conduct of the parties, it is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights. It is said that, the Plaintiff having described herself as the widow of the testator, and having alleged, upon her bill, that *Penfold* was dead in the year 1817, when she performed the ceremony of marriage with the testator, whereas it is proved, by the evidence, that that allegation is contrary to the fact, her bill ought to be dismissed out of this Court; but I cannot say that that allegation is of such a nature that it ought to deprive her of the right to the legacy which she has under the will of the testator, and of her right to claim the benefit of the bequest in this suit. As the Defendants admit assets, therefore, the usual accounts must be taken of the testator's personal estate. The consideration of costs will be very material in this case, where the conduct of parties is open to so much censure; but, for the present, costs must be reserved.

1837.

1837.
July 14. 17.

SMITH *v.* PHILLIPS.

A. made an equitable mortgage of certain premises to *B.*, and he afterwards entered into an agreement to grant a lease of the premises to *C.*, who had notice of the prior charge. *A.* became bankrupt before the lease was executed, and on the petition of *B.* an order in bankruptcy was made, under which the premises were sold, and *B.* became the purchaser, and retained the amount of his equitable mortgage out of the purchase-money:

Held, on a bill filed by *C.* for specific performance of the agreement, that *B.* having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement.

IN the year 1831 *William Holman*, being possessed of a certain messuage in the county of *Hertford*, which he held for the residue of a term of ninety-nine years, made an equitable mortgage of the same to the Defendant *John Phillips* to secure the repayment of a loan of 400*l.* and interest.

In *April* 1833, *Holman* entered into an agreement to let the above-mentioned messuage to the Plaintiff *Smith*; and the following memorandum was signed by both parties: —

"Memorandum of an agreement made and entered into this 6th day of *April* 1833, between *William Holman*, victualler, and *William Smith*, painter. — Whereas it hath been agreed between the parties hereto, that *W. Holman*, being the landlord of the public house called the *Half-way House* between *Ware* and *Hertford*, shall let to *William Smith* the said house and premises, at the sum of 35*l.* per annum, payable half-yearly, it is hereby agreed that *William Holman* shall grant to *William Smith* a lease of the said premises for the term of seven, fourteen, or twenty-one years, determinable by a notice to be given by the said *William Smith* in writing at the least six months prior to the end of either of the said terms, he, the said tenant *William Smith*, hereby agreeing to pay all taxes and parochial assessments (except the land tax), the said rent to be paid half-yearly from the day of the 25th of *March* last; and

1837.

SMITH v. PHILLIPS.

and that *William Holman*, his executors or administrators, shall take of the said *William Smith*, his executors or administrators, the fixtures of the said house and premises at the expiration or other determination of the said term, at a fair valuation, if required by the said *William Smith*. And it is also agreed that *William Smith* shall pay to *William Holman* the sum of 60*l.* over and above the valuation of the furniture, stock in trade, and effects in and upon the said premises at the time of him, the said *William Smith*, taking possession thereof. The said *William Holman* to pay all rates, taxes, and impositions up to the time of his giving possession under this agreement."

Previously to the date of this agreement, *Holman* had notice of the equitable mortgage of the Defendant *Phillips*. In pursuance of the agreement, the stock and effects were valued at the sum of 216*l.*, which sum, together with the consideration money for the lease, was paid by the Plaintiff, and the Plaintiff was thereupon let into possession.

On the 15th *June* 1833, and before a lease was executed, *Holman* became a bankrupt. On the 28th of *November* following, the Defendant presented a petition in the Court of Review, stating his equitable mortgage, and praying that the premises might be sold, and that he might be paid out of the produce of the sale so much as was due to him upon his security. By an order of the Court of Review, the premises were directed to be sold, and were sold accordingly by public auction on the 22d of *February* 1834. The Defendant had liberty to bid at the sale, and became the purchaser at the sum of 600*l.*, out of which he retained the amount due to him in respect of his equitable mortgage. The agreement for the lease was produced at the sale by an agent of

1837.

SMITH v. PHILLIPS.

of the Plaintiff, and read in the auction room; and the solicitor for the Defendant also read an opinion of counsel to the effect that the equitable mortgagee was not bound by the agreement, and that the Plaintiff could not enforce the same against him.

By an indenture of assignment, dated the 6th of *May* 1834, between the assignees of *Holman* of the first part, *Holman* of the second part, and the Defendant of the third part, it was witnessed that, for the considerations therein mentioned, the assignees and *Holman* assigned to the Defendant, his executors, &c. the premises in question, subject to the rents and covenants in the original lease, and also subject to the claim of the Plaintiff to a lease under the memorandum of agreement of the 6th of *April* 1833; but it was thereby declared that "nothing in such exception contained was meant to admit the validity of such claim, and which claim the Defendant, at the time he purchased the said premises, was advised and believed to be void."

Shortly after the purchase, the Defendant gave notice to the Plaintiff to quit the premises; and, on the refusal of the Plaintiff to quit at the expiration of such notice, the Defendant brought an action of ejectment to recover possession of the premises.

The bill prayed a specific performance of the agreement of the 6th of *April* 1833, and that the Defendant might be decreed to grant a lease in pursuance thereof.

Mr. *Pemberton* and Mr. *Bethell*, for the Plaintiff.

The Plaintiff is clearly entitled to the specific performance of this agreement. The Defendant purchased from

1837.

SMITH v. PHILLIPS.

from the assignees the leasehold interest, which was subject to his own equitable charge and to that of the Plaintiff. His own charge was paid out of the purchase-money; and he became the owner of the leasehold estate discharged from the mortgage, and subject to the equitable charge of the Plaintiff. This is the common case of a first incumbrancer, who, with notice of a second incumbrance, purchases the estate, and by so doing extinguishes his own charge, and lets in the second incumbrancer. He might have kept his equitable mortgage on foot by making an assignment of it to a third person before he became the purchaser; but, as he has not done so, there remains no incumbrance upon the estate, except that which arises out of *Holman*'s agreement to grant a lease to the Plaintiff, and that agreement the Defendant is bound to perform. The very indenture of assignment, under which the Defendant claims, shews that he bought the estate subject to the agreement for the lease.

Mr. *Temple* and Mr. *Sharpe*, *contrà*.

The Defendant had an equitable mortgage, and the Plaintiff an equitable lease; the equities, therefore, being equal, priority in point of time will prevail, and the Plaintiff cannot set up a subsequent charge to defeat the prior charge of the Defendant. All that the Plaintiff can by possibility pretend to claim is the value of the lease contracted for, after satisfaction of the prior charge of the Defendant. Supposing, then, the estate to have sold for no more than the amount of the debt and interest due to the Defendant, the value of the lease would be nothing; and it would be less than nothing, if the produce of the sale had fallen short of the amount of the prior charge. In either of those events,—and either of them might well have happened,

1837.

SMITH v. PHILLIPS.

if the Defendant had not been induced to bid a higher price for the estate than he would have done, had he supposed the agreement to be a valid one, — it would have been impossible to grant a lease; for the subject-matter of the agreement, namely, the estate subject to the charge, would have had no existence. This shews that an agreement to grant a lease with notice of a prior mortgage, which may or may not exhaust the estate, is not an agreement of such a definite nature, as that its specific performance can be enforced in this Court. In the present case, the Plaintiff, a second incumbrancer, claims in priority to the first; and, if the residue of the purchase-money, after satisfaction of the Defendant's charge, is no more than equivalent to the value of the lease contracted for by the Plaintiff, the Defendant is actually called upon to pay that sum out of his own pocket. In other words, it is insisted for the Plaintiff, that the Defendant bought nothing but the liability to discharge the obligations of the bankrupt. This is plainly contrary to all justice, and cannot be reconcilable with any principle of equity. If the estate had been purchased by a stranger, the Plaintiff could only have claimed the benefit of his agreement after satisfaction of the Defendant's mortgage; and how can the equities between the Plaintiff and Defendant be varied by the circumstance of the Defendant having become the purchaser? Even if the Defendant has, by the operation of a technical rule, lost the advantage of his priority in consequence of his having omitted to make an assignment of his security, this is not a case in which the Court is called upon to determine the priorities of the incumbrancers, but in which the Plaintiff seeks for specific performance, which it is in the discretion of the Court to refuse, where a party is endeavouring to take an advantage of a technical rule against the justice of the case.

Mr.

Mr. *Pemberton*, in reply.

1837.

SMITH v. PHILLIPS.

Whatever disadvantage may have accrued to the Defendant from his purchase, he bought with his eyes open; and having united the characters of mortgagee and owner, and thereby discharged the estate of his own incumbrance, he is no longer in a situation to claim priority to the second incumbrancer. (*a*)

The MASTER *of the* ROLLS.

July 17.

In this case *Holman* made an equitable mortgage of the premises to the Defendant, and he afterwards entered into an agreement to grant a lease of the same premises to the Plaintiff. *Holman* became a bankrupt; the property was sold under an order of the Court of Review, made on the petition of the Defendant, the equitable mortgagee. The Defendant himself became the purchaser, and received or retained out of the purchase-money the sum secured by his equitable mortgage. The premises were sold subject to the Plaintiff's claim under the agreement, and the assignment expressly recites that they were so sold. The Plaintiff has a clear right to have the lease which he contracted for, and that right is to be worked out against the equity of redemption. No doubt, the interest of the bankrupt might have been so sold as to keep the equitable mortgage of the Defendant distinct from the equity of redemption; but the Defendant, by becoming the purchaser, has united those interests; and

(*a*) For the grounds, upon which the Court has determined the equities between a second incumbrancer and a prior incumbrancer who, with notice of the subsequent incumbrance, has purchased the equity of redemption, see the cases of *Greswold* v. *Marsham*, 2 *Ch. Ca.* 170.; *Toulmin* v. *Steere*, 3 *Mer.* 210.; and *Parry* v. *Wright*, 2 *Sim. & Stu.* 563, and 5 *Russ.* 142.

1837.

SMITH *v.* PHILLIPS.

and the question is, whether the equitable mortgage and the equity of redemption having been united, those interests can now be separated. I am of opinion that they cannot be separated; and that the Plaintiff is entitled to have his equitable charge satisfied out of the united interests which now constitute the equity of redemption.

1836. *Dec.* 18, 19. 1837. *Jan.* 13.

The ATTORNEY-GENERAL *v.* The Corporation of NORWICH.

Demurrer to an information against the corporation of *Norwich*, praying for an injunction to restrain certain applications of the city fund of the borough and city of *Norwich*, which, as the information alleged, were intended to be made in violation of the Municipal Corporation Act, 5 & 6 *W.* 4. *c.* 76., allowed under the circumstances.

THIS information was filed by the *Attorney-General*, at the relation of *Samuel Bignold*, against the Mayor, aldermen, and burgesses of the city of *Norwich*, and against *Thomas Osborne Springfield*, *Thomas Brightwell*, *Peter Finch*, *Henry Willett*, and *Thomas Edwards*; and, in substance, it prayed the Court to declare, that certain applications intended to be made of the city fund of the borough and city of *Norwich* were contrary to and in direct violation of the provisions of the act for regulating municipal corporations (*a*), and a breach of the trusts and duties of the Mayor, aldermen, and burgesses, and ought to be restrained by the order and injunction of the Court; and that an injunction might be accordingly granted; and that in case any sums have been wrongfully paid, as alleged, the same might be repaid and refunded by such persons,

(*a*) 5 & 6 *W.* 4. *c.* 76.

Whether the Court has jurisdiction, notwithstanding the provisions of the Municipal Corporation Act, to restrain misapplications of the borough fund of a corporation, *quære.*

In the ordinary management of the borough fund a court of equity ought not to interfere; but in a case of misapplication calling for a specific remedy, *semble*, that the jurisdiction of the Court is not excluded by the Municipal Corporation Act.

persons, and in such manner as there might be occasion; and that the Defendants *Springfield*, *Brightwell*, *Finch*, and *Willett* might be decreed personally to pay the costs of the relator incidental to the suit, and for general relief.

By the seventy-first section of the act, it is provided that estates vested in corporations in their corporate character in trust for charitable purposes should cease on the 1st day of *August* 1836; and that if, before that time, no other direction should be made by Parliament, the Lord Chancellor should make such orders as he should think fit for the administration of such trust estates, subject to the charitable uses.

No other direction having been made by Parliament, the Lord Chancellor proceeded to exercise the power vested in him by appointing trustees for the administration of the charity estates, vested in corporations, upon applications made to him by petition; and, some time before the 19th of *August* 1836, Mr. *Springfield*, then acting as Mayor, and certain members of the council of *Norwich*, presented or prepared to present a petition to the Lord Chancellor on the subject; and, on the 19th of *August*, certain proceedings of the council of *Norwich* took place, and were entered in the books of the Corporation as follows: — " Mr. Councillor *Finch* moved, and Mr. Councillor *Beare* seconded the following resolutions, which, being put to the vote, were carried by a majority of twenty-one, there being ayes thirty-two, noes eleven: viz. Resolved, that this council do adopt the petition already presented, or in course of presentation, to the Lord Chancellor, by the Mayor of this city and other members of the council, praying for the appointment of trustees to the several charities in this city lately under the management of the former corporation; and that

1836.

The Attorney-General v. Corporation of Norwich.

the town clerk be instructed to procure an order of the Lord Chancellor in conformity with the prayer of such petition; and that the town clerk be empowered to attach the city seal to the same, or a copy thereof. Resolved, that the Mayor, and *Peter Finch*, and *Henry Willett*, Esquires, together with the town clerk, be a deputation to proceed to *London* for the purpose of furthering the objects of the petition, with power to employ attorneys and counsel as they may think necessary, and that the town clerk be authorised to take such corporate books and documents as he may think proper, together with such other evidence or testimony as he may deem necessary; and that he be also authorised to take the opinion of one or more counsel on any points touching the said charities, or the estates belonging to the same, as he may think proper or be advised."

On the 23d day of *September* following, other proceedings of the council took place, and were entered in the book as follows: — "It was moved by Mr. Alderman *Young*, and seconded by Mr. Councillor *Spratt*, that the following resolution be agreed to by the council: viz. Resolved, that the authority and power given to the deputation, appointed by a resolution of a council at a former meeting held on the 19th day of *August* last, for promoting and furthering the objects of the petition preferred to the Lord Chancellor by *Thomas Osborne Springfield* and others in the matter of the charities, be continued to the gentlemen forming such deputation; and that the town clerk be ordered to take all requisite proceedings for carrying the resolutions and orders of the council, touching the appointment of trustees of the charities, into effect. Whereupon Mr. Councillor *Bignold* moved, seconded by Mr. Councillor *James Steward*, as an amendment, that the said resolution be not adopted by the council. The chairman put the amend-

1836.

The Attorney-General v. Corporation of Norwich.

amendment to a shew of hands, which was negatived by a large majority, and the original resolution was adopted and agreed to."

The information charged that, in pursuance of the resolutions, the persons named as a deputation, came to *London* for the alleged purpose of attending to the petition, and that great costs had been incurred for their travelling and other expenses, and for their entertainment. That such costs had not been, and were not intended to be paid by the individuals who incurred them; but were paid by Mr. *Staff*, the town clerk, or left unpaid, upon an arrangement or understanding that the same should be defrayed out of the city or borough fund, or other property of the corporation.

The information further stated, that on the 4th of *November* 1836, two rules were made by the Court of King's Bench, by one of which rules the 14th day of the same month was given to Mr. *Springfield* to shew cause, why an information in the nature of a *quo warranto* should not be exhibited against him to shew by what authority he claimed to be mayor of *Norwich*, and by the other of which rules the same day was given to Mr. *Brightwell* to shew cause, why the like information should not be exhibited against him, to shew by what authority he claimed to be an alderman of *Norwich*. And that on the 11th of *November* between the date of the rules and the time given for shewing cause, a meeting of the council of *Norwich* was held, and an order was made as follows; viz. — "Ordered that the town clerk be, and he is hereby directed and authorised to adopt the necessary measures for shewing cause against the rule *nisi* of the Court of King's Bench, obtained by *Samuel Bignold* and *Henry Rogers* for an information *quo warranto* against *Thomas Brightwell* a member of

1836.

The Attorney-General v. Corporation of Norwich.

this council, and that the city treasurer be authorised and directed to pay from time to time out of the city funds to the town clerk such sums of money as the city committee shall think proper and requisite for defraying the law expenses and disbursements of, and attending such shewing cause, or otherwise in relation to the said rule, such orders to be signed by three members of the said committee. And further ordered that the town clerk be, and he is hereby directed and authorised to adopt the necessary measures for shewing cause against the rule *nisi* of the Court of King's Bench, ob-obtained by *Samuel Bignold* and *Henry Rogers* for an information *quo warranto* against *Thomas Osborn Springfield*, Esq., a member of this council; and that the city treasurer be authorised and directed to pay from time to time out of the city funds to the town clerk such sums of money as the city committee shall think proper and requisite, for defraying the law expenses and disbursements of and attending such shewing cause, or otherwise in relation to the said rule, such orders to be signed by three members of the said committee."

The information alleged that the Defendants *Springfield*, *Brightwell*, *Finch*, and *Willett* were present when this order was passed, and supported the making of it; that afterwards, on the 24th of *November*, the rule against *Brightwell* was made absolute, and the rule against *Springfield* was enlarged. That expenses had been incurred upon the authority and foundation of the orders, and that the Mayor, aldermen, and burgesses, and the individual Defendants, wrongfully intended to sign the requisite order of the corporation to pay Mr. *Staff* the town clerk, who acted as attorney for *Springfield* and *Brightwell*, the costs and disbursements occasioned by the proceedings in the Court of King's Bench.

The

1836.

The Attorney-General v. Corporation of Norwich.

The information charged that the intended application of the city funds was altogether wrongful, contrary to the statute, and in breach and violation of the duties and obligations of the mayor, aldermen, and burgesses, as trustees of the funds and property of the corporation for the benefit of the burgesses or citizens and inhabitants.

To this information, two general demurrers, for want of equity, were put in; one by the corporation and Mr. *Edwards*, the treasurer; the other by *Springfield*, *Brightwell*, *Finch*, and *Willett*.

The arguments urged at the bar, in support of the demurrer on the one side, and of the information on the other, are stated in his Lordship's judgment.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Booth*, in support of the demurrer.

Sir *Charles Wetherell*, Mr. *Tinney*, and Mr. *Anderdon*, *contrà*.

The Master *of the* Rolls.

The prayer of this information is supported by a general allegation, that the intended application of the city fund is altogether wrongful, directly contrary to the clear and express words of the statute, and in breach and violation of the duties and obligations of the Mayor, aldermen, and burgesses, as trustees of the funds and property of the corporation for the benefit of the burgesses or citizens and inhabitants of the city. But there is no allegation that the corporation has no interest either in the appointment of trustees of the charities, or in

1837.

The Attorney-General v. Corporation of Norwich.

in the proceedings arising out of the rules of the Court of King's Bench, no allegation that the borough fund is insufficient to pay all the expenses which, by the ninety-second section of the act, are specifically directed to be paid, or that all those expenses have not been paid, or that there is no surplus after these payments. In the argument for the demurrer, it is, in the first place, admitted, that the council, as the governing body of the borough, has not a right to do what it will with the borough fund, or the corporate property; and that, in one sense, the Mayor, aldermen, and burgesses, represented by the council, may be considered to be trustees; but it is contended that, if considered as trustees, they are trustees for themselves alone, and subject only to the checks and control given by the statute. That the trust was created, not with a view of giving courts of equity a jurisdiction to interfere in every case in which any burgess or inhabitant differed from the decision of the council on the propriety of any item of expense, but for the purpose of affording a rule, as between the representative governing body, and the burgesses at large, and that the observance of that rule is secured, in the only way the legislature intended, by the power given to the burgesses to elect the councillors and auditors, and to examine the accounts. It is further argued, that, in this case. there is nothing in the proposed application of the borough fund which can reasonably be called wrongful; that the corporation has a substantial interest in the due administration of the charity estates, and in defending elections properly made. It is further argued, that a jurisdiction such as is now proposed to be exercised ought not to be entertained at all; that there is no case in which the Court, having no fund or estate on which it can operate, has been called upon prospectively to restrain trustees from incurring expenses conceived by them to be within the scope of their trust; that,

that, if there were a trust estate to be administered, and an account to be taken, an improper item might be disallowed, but that here, there is no trust estate or fund which can be administered in this Court; and yet the Court is asked to interfere prospectively, because it is apprehended a misapplication may be made; and it is urged that, if this jurisdiction be sustained there is no single expense of a corporation which may not be prospectively submitted to the jurisdiction of a Court of Equity; that the litigation and the mischief would be enormous, and the act could not be worked.

Even if the Court had jurisdiction, it is said, it could only be in cases of fraud and corruption, or in cases of such palpable and notorious breaches of trust, that fraud or corruption might be imputed; that there was nothing of that sort here, and, if the Court interfered in this case, it must in every case where an individual impugns an order for payment made or expected to be made by the council.

Moreover it is urged, that if the members of the corporation can or ought to be divided into trustees and *cestuis que trust*, the council which makes the order for payment, and the burgesses at large who are to be affected by the order, are the only distinct component parts which can stand towards each other in the relation of trustees and *cestuis que trust;* and if this be so, any burgess on the behalf of himself and others might file a bill against the members of the council, or such of them as were complained of, and the Attorney-General would have nothing to do with the complaint, which ought to be the subject of a bill, not of an information.

It is also contended that the individuals who are made Defendants are selected without there being any circumstance

1837.

The Attorney-General v. Corporation of Norwich.

circumstance to distinguish them from others who are not made so; that they are a few out of many persons who have concurred in certain resolutions and orders alleged to be breaches of trust; and that it is endeavoured to charge them in the absence of the others against all principle.

In answer to these arguments, it is alleged in support of the information, that by the ninety-second clause of the act, the Mayor, aldermen, and burgesses are trustees of the borough funds, bound to apply them strictly for the corporate purposes expressed in the statute, and not for any other purpose, unless there should be a surplus of the borough fund, in which case alone there is power to apply any part of the funds for what may be called the public benefit of the inhabitants and improvement of the borough. That, in this case, which is to be determined on the information and demurrer, it does not appear that there is any surplus fund, and consequently only those applications of the fund which are specifically authorised by the act are to be considered. Amongst them no mention is made of charity petitions, or such proceedings as have taken place in the Court of King's Bench, and, even if there were a surplus fund, the same ought not to be applied for the purposes now in contemplation. By the words of the seventy-first section, the administration of the charity funds is to be kept distinct from the administration of the public stock, or borough fund, and by the plain spirit of the act, the corporation ought to have nothing to do with the charity foundations in any way, either by interfering in the appointment of trustees or otherwise. To incur expense on account of matters relating to charities might, and, if there were no surplus, certainly would, subject the rate-payers to rates for purposes with which the legislature

lature intended the borough to have no concern; and if such a proceeding be permitted, the council of every borough would be enabled to interfere in every charity petition at the cost of the rate payers. Again, the proceedings in the Court of King's Bench are not proceedings and matters relating to such elections as are mentioned in the statute; and, therefore, the expenses attending them are not such expenses as are contemplated and authorised by the ninety-second section. If the election of the particular persons named in the rules were void, a wrong was done to the corporation in the pretended elections; and another wrong would be done to the corporation in defending such pretended elections at the expense of the corporation. The corporations indeed have nothing to do with the proceedings upon the rules by which such individuals only are called upon to shew cause; and to permit the expense of those proceedings to be thrown on the borough would be again to subject the rate-payers to a rate for purposes in which the corporation has no concern; and to allow this would be to enable the council of every borough to defray the costs, arising, however remotely, out of any election, however bad, out of the borough fund, to be supplied by a rate to be enforced by seizing the goods of the rate-payers. And, further, as the borough fund is a trust fund, and to pay such expenses would be a misapplication or breach of trust, it is next urged that it is a breach of trust to be controlled by this Court, and upon an information framed as this is. It is admitted that the case is new; that the sort of interposition which is asked is not like any thing which has been before granted; that there is not and cannot be a suit for the general administration of the trust fund; that there has not yet been any actual misapplicaton of the trust fund, and, therefore, the usual grounds for interfering with the discretion of trustees are wanting; but that

1837.

The Attorney-General v. Corporation of Norwich.

that there is an intended misapplication of the trust fund, and that such misapplication has been actually ordered for purposes which are known. That the Court certainly has jurisdiction to prevent breaches of trust, and from the necessity of the case, it is by prevention alone that the Court can beneficially interfere. All the corporate funds are trust funds; all have, as they from time to time arise, their proper application to certain specified corporate purposes; and, if at any time there be a misapplication, there are not and cannot be any funds free from trusts out of which compensation can be made, so that if the Court does not interfere to prevent a breach of trust by misapplication of the funds, no redress can be had against any funds of the corporation; and the individuals promoting or concurring in an improper order, though liable, may not be able to answer the breach.

Such are the arguments urged in support of the information, and in considering those arguments it appears to me that some things are assumed which cannot be admitted. The information does not allege, and I cannot act on the assumption that there is no surplus of the borough fund, or that the election of the persons named in the rules of the Court of King's Bench were void. There may be a surplus or not, and it may or it may not be true that the elections of the persons claiming to be Mayor and aldermen were void; and, upon the argument of a demurrer, I conceive that any thing which the informant has, without reason assigned, left doubtful upon the information, ought to be construed against him, and not in his favour. Again, it does not appear to me a necessary or even a reasonable construction of the statute, that the corporation has no interest or concern in the administration of charity estates formerly vested in the corporation. The administration

ministration of the charity estates is to be distinct from the administration of the borough fund, and neither the corporation, nor any members in their corporate capacity, are to be trustees of the charity estates; but still the corporation, "attending to the public benefit of the members of the corporation and of the inhabitants," may have a material interest in the due administration of the charity estates, and in the appointment of the trustees to whom that administration is to be committed.

And it is to be considered that to separate the administration of the borough fund from the administration of the charity estates, is one of the objects and purposes of the act. In the events which have happened, that object was to be effected only by a petition to the Lord Chancellor, which therefore became a measure necessary for carrying into effect one of the provisions of the act; and the expenses necessarily incurred, in carrying into effect the provisions of the act, are amongst the expenses specifically authorised by the ninety-second section; and if the corporation were not allowed to defend an election duly made, the interests of the corporation, and even its existence, might be put to hazard in every case in which a Mayor, alderman, or other officer did not choose to be at the expense of defending his own election against a rule *nisi*, obtained against him in the Court of King's Bench.

[Here his Lordship went into a detail of the provisions made by the statute for the constitution of the governing body, and the due management of the revenues of the corporation.]

It has been argued for the Defendants, and the constitution and regulations provided by the statute afford grounds

1837.

The Attorney-General v. Corporation of Norwich.

grounds for the argument, that the intention was to control misapplication of the borough funds by the means which were to be possessed by the burgesses themselves. They are governed, and their corporate property is disposed of, by their own representatives, persons chosen by themselves, or appointed by those who are chosen by themselves; for of such persons the council wholly consists. The acts of the council are to be done at meetings, of which public notice is to be given, and are to be decided by a majority of the members present; and the votes of the majority are not to be considered as the acts of the majority alone, or as the acts of the individual members comprising the majority, but they constitute the acts of the council; and being the acts of the council, they are the acts of the Mayor, aldermen, and burgesses, or of the corporation at large. The orders of the council are to be signed by three councillors: the treasurer, who is an officer of the council, is to state for what the payments are made. The auditors are the officers of the burgesses chosen by themselves in a peculiar manner, intended, I presume, to protect the minority against the predominance of a faction, if the burgesses should unhappily be split into factions. A councillor named by the Mayor is to be present at the examination and audit of the accounts by the auditors; they are to sign the accounts, if found correct, and then a full abstract is to be open to the inspection of all the rate-payers and rendered public.

The accounts being published after the examination by the auditors, any misapplication of the fund is made known, and the burgesses, if they think fit, may refuse to re-elect the councillors who have concurred in such misapplication. And if we consider the great authority given to the councillors, and that the fund alleged to be misapplied

misapplied is the property of the Mayor, aldermen, and burgesses, or that the rate, out of which, in the last resort, the fund is to be supplied, is a burthen upon the burgesses, or upon those who are about to become burgesses, or upon persons enjoying the benefit of the borough government, and of the borough fund, it may be that no other control than that which I have referred to was intended to be exercised over the ordinary applications of the fund. It is obvious, however, that this view of the case is subject to serious difficulties, and many particular cases may be conceived in which great injustice and injury might be done, if no sufficient remedy for specific and individual misapplications were afforded.

1837.

The Attorney-General v. Corporation of Norwich.

I am of opinion, however, that the present case does not impose upon me the duty of deciding upon any general question as to the jurisdiction of this Court in cases of alleged misapplication of the borough fund; as it appears to me that, even if such jurisdiction exists, a case is not, upon this information, made out for applying it. For any allegation of fact which is contained in this information, the applications which are now proposed to be made of the borough fund, and which the information seeks to restrain, may be proper. A mere general charge that the proposed applications are wrongful will not supply the want of facts from which it is fairly and legally to be deduced that wrong is about to be done. The information stating intended acts which may or may not be wrongful (and upon that I give no opinion) cannot be sustained, upon a mere allegation that they are wrongful, in the absence of the facts and circumstances by which alone it can be determined whether they are wrongful or not. Whatever may be the jurisdiction, I think that a court of equity ought not to apply it in the consideration of particular

1837.

The Attorney-General *v.* Corporation of Norwich.

items of expense which may or may not, for any thing which appears upon the record, be proper for the corporation to pay, but which happen to excite the displeasure of some individual who thinks it worth his while to promote an information.

Demurrer allowed.

This decision was appealed from, and affirmed by the Lord Chancellor.

1836. *Dec.* 21, 22. 24.

Motion to restrain a creditor, after a decree, from issuing execution on a judgment obtained before the decree *de bonis testatoris, et, si non, de bonis propriis* as to costs, refused under the circumstances.

Principles upon which the Court acts in restraining proceedings at law, after a decree, with reference to the priority of the decree or judgment at law, and other circumstances.

LEE *v.* PARK.

THIS was a motion, on behalf of the Defendants, *Godfrey Park* and *James Iveson*, executors of the will of *Richard Bigham*, deceased, for an injunction to restrain the Rev. *William Gilby* and *Henry John Shepherd*, executors of the will of *John Lockwood*, deceased, from issuing execution upon a judgment, obtained by them at law on the 8th of *August* 1835, upon a bond, dated the 6th of *April* 1824, and given by *Richard Bigham*, the testator in the cause, to *John Lockwood*, and *Robert Sandwith*, deceased.

The bond was conditioned to secure the repayment of the sum of 1800*l.* advanced by *Lockwood* and *Sandwith*, the trustees under a marriage settlement, to *Richard Bigham*, with interest at 4 per cent. *Richard Bigham* died shortly after the execution of the bond, without having paid the debt thereby secured, and having by his will, dated the 26th of *January* 1825, appointed *Godfrey Park* and *James Iveson* his executors.

John

1836.

LEE v. PARK.

John Lockwood survived his co-trustee *Sandwith*, and died on the 9th of *May* 1827, having made a will by which he appointed *William Gilby* and *Henry John Shepherd* his executors.

The executors of *Lockwood*, being unable to obtain payment of the bond debt and interest, brought an action in the Court of Exchequer of pleas, on the 19th of *June* 1835, against *Park* and *Iveson*, the representatives of *Richard Bigham*, to recover the sum of 2606*l.* 11*s.* 11*d.*, being the amount of the principal and interest due upon the bond at that time. The Defendants at law at first pleaded *non est factum*, but, being advised that they had no defence to the action, they withdrew that plea, and suffered judgment to go by default. The costs were taxed by the Master at 20*l.* 9*s.*, and judgment was entered up, on the 5th of *August* 1835, for the amount of the debt and costs to be levied *de bonis testatoris, et, si non, de bonis propriis* as to the costs. On the 5th of *December* 1835, the Plaintiffs at law issued a writ of *fieri facias de bonis testatoris* on the judgment indorsed by the sum of 2627*l.* 0*s.* 11*d.*, but the writ remained unexecuted, there being no goods of the testator.

On the 10th of *July* 1832, *John Lee* and *Eleanor* his wife, and *Cicely Robinson*, claiming as legatees under the will of *Richard Bigham*, filed their bill against *Park* and *Iveson*, the executors of that will, and other parties, praying for the usual amounts of the testator's personal estate, and for the application of the same in a due course of administration.

By the answer of all the Defendants to the bill, the Defendants *Park* and *Iveson* stated their belief, that they had possessed themselves of the personal estate and effects of the testator sufficient to pay all his debts,

1836.

LEE v. PARK.

funeral and testamentary expenses, but not his legacies charged on his personal estate. They admitted that they had entered into possession of the testator's real estates, and receipt of the rents, and that the rental of the real estates was 350*l.* per annum. The Defendant *Iveson* admitted that he was a solicitor, and that he had received all the rents of the real estate; but he denied that either of the executors had then or at any time any balances in their hands of the testator's personal estate, or of the rents of the real estate, except such small sums as might from time to time have remained in their hands until the application thereof, but the amount of which the Defendants were unable to set forth.

By their further answer, the Defendants *Park* and *Iveson* said that *Park* had received the greater part of the personal estate, and had made the greater part of the payments on account of debts and annuities, which had been made under the trusts of the will.

By a schedule to the further answer, it appeared that, the sum of 5265*l.* 19*s.* 11*d.* had come to the hands of the testator's executors, and that a considerable portion of that sum had been applied to the payment of the testator's simple contract debts. It appeared further by this schedule, that the whole of the payments made by the executors amounted to 4340*l.* 11*s.* 4*d.*, leaving an apparent balance in their hands of 925*l.* 8*s.* 7*d.*

The decree for the usual accounts was made on the 30th of *January* 1836.

The motion for the injunction was supported by an affidavit stating the judgment, and the decree, and that the Plaintiffs at law threatened to issue execution on the judgment.

By

1836.

LEE v. PARK.

By an affidavit filed in opposition, it was stated that the Plaintiffs at law had received no notice of the suit in equity, or of the decree therein, except from the affidavit of the executors.

Mr. *Bethell*, in support of the motion, said this was the ordinary application, on the part of the executors, to restrain a creditor, after a decree, from proceeding to issue execution upon his judgment. It was immaterial whether the decree or the judgment had priority in point of time; *Goate* v. *Fryer* (*a*); the only condition necessary being, that the form or quality of the judgment was not such as to preclude the Defendant at law from obtaining the protection of the Court. If the judgment were *de bonis testatoris* the Court would not, after a decree, suffer execution to be taken out upon such a judgment, and the Defendant at law was entitled of course to an injunction: *Brook* v. *Skinner*. (*b*) If the executor, by pleading a false plea, gave the creditor a right to a judgment *de bonis propriis*, the Court would not relieve him from the personal responsibility which he had thus incurred; *Terrewest* v. *Featherby* (*c*); but if the judgment were *de bonis testatoris*, *et si non*, for the costs only, *de bonis propriis*, the Court would restrain the creditor from proceeding at law; *Lord* v. *Wormleighton* (*d*); and that is the form of the judgment against an executor, where it is suffered to go by default. *Hancocke* v. *Prowd*. (*e*) The Plaintiff in equity, being advised that he had no defence to the action, was right in suffering judgment to go by default; and, Lord *Eldon*, in a similar case, said that the executor's suffering judgment to go by default was no more than his saying that he was ready to

(*a*) 2 *Cox*, 201.
(*b*) 2 *Mer*. 481. n.
(*c*) 2 *Mer*. 480.
(*d*) *Jac*. 148.
(*e*) 1 *Saund*. 336. Serj. *Williams*'s note.

1836.

LEE v. PARK.

to do whatever a court of law or equity might think proper: *Dyer* v. *Kearsley*. (*a*) This application was not merely for the protection of the executors, but for the protection of all the creditors, for a decree against an executor for the administration of the assets was in the nature of a judgment for all the creditors, and stopped all proceedings at law after notice of the decree: *Morrice* v. *The Bank of England* (*b*), *Paxton* v. *Douglas* (*c*), *Largan* v. *Bowen*. (*d*)

Mr. *Piggot*, *contrà*.

The judgment obtained by the creditor in this case, is substantially a judgment against the goods of the executor, for, although, in point of form, satisfaction is given in the first instance out of the goods of the testator, if the sheriff return *nulla bona*, the creditor, suggesting a *devastavit*, may bring an action upon the judgment, and so obtain satisfaction out of the goods of the executor. The executors, by suffering judgment to go by default, admit assets, and if none are found, or if, as appears by the schedule to the answer, a *devastavit* has been committed, they are personally liable for the debt; and against that personal liability a court of equity will not protect them. Where there is a decree for the administration of the assets, the Court will not interfere further than is necessary to protect the general creditors, and will not interpose to protect the executor against a liability to which he has subjected himself personally: *Kent* v. *Pickering* (*e*). The answer gives no satisfactory account of the state of the assets; no affidavit has been filed for the purpose of explaining the statement made in the answer, nor does it appear that any

(*a*) 2 *Mer.* 482. n.
(*b*) *Ca. temp. Talb.* 217.; and 2 *Bro. P. C.* 465. edit. *Toml.*
(*c*) 8 *Ves.* 520.
(*d*) 1 *Sch. & Lef.* 296.
(*e*) 5 *Sim.* 569.

any steps have been taken to bring into Court the balance appearing to be in the hands of the Defendants. Under such circumstances, it is submitted that the Court ought to refuse this application.

1836.
LEE
v.
PARK.

Mr. *Bethell*, in reply.

The MASTER *of the* ROLLS. *Dec. 24.*

It has been argued that in cases of this nature the Court pays no regard to the question, whether the decree or judgment has priority in time, but considers only the quality of the judgment, and that, the judgment in this case being a judgment to recover *de bonis testatoris*, the executors are, as of course, entitled to restrain the judgment creditors from issuing execution. I do not accede to that argument. The jurisdiction in these cases was first established upon questions which arose between judgments at law, and decrees in equity, for payment of ascertained debts out of the assets. It was determined that such decrees and such judgments were, in the administration of legal assets, to be considered of equal value, and that the one which was prior in time (whether decree or judgment), should be first satisfied out of the assets: *Morrice* v. *The Bank of England* (*a*), *Martin* v. *Martin* (*b*). In the beginning, a judgment, obtained after a decree *quod computet*, (not being a decree for payment of an ascertained sum out of the assets) was preferred; *Ferrers* v. *Shirley* (*c*); but, subsequently, Lord *Thurlow* put the jurisdiction on this, — that, the Court having decreed an account of debts

(*a*) *Ca. temp. Talb.* 217. *S. C.* more fully, 3 *Swanst.* 573.; and 2 *Bro. P. C.* 465. edit. *Toml.*

(*b*) 1 *Ves.* sen. 211.

(*c*) cited 10 *Ves.* 39.

1836.

LEE v. PARK.

debts and assets, and ordered payment in a due course of administration, must be considered to have taken the fund into its own hands, and could not suffer its decree to be rendered nugatory by altering the course of administration, but ought to protect the executor in obeying its decrees; and he, therefore, granted injunctions to restrain proceedings at law after a decree *quod computet*, *Kenyon* v. *Worthington* (*a*): and, as it was the practice, in creditors' suits, for the Plaintiff suing for himself and others to prove his own debt prior to the hearing, there was, perhaps, not much difficulty in considering a decree for the administration of assets, in such a suit, as in the nature of a judgment for all the creditors; but Lord *Thurlow*, acting on the principle to which he attributed the jurisdiction, gave the like authority to a decree *quod computet*, which was obtained in a suit instituted by the trustees under a testator's will, and to which no creditor was a party; *Brooks* v. *Reynolds*. (*b*)

It was, however, contended that the creditor was not to be deprived of the benefit of a judgment which he had obtained prior to the decreee: *Goate* v. *Fryer* (*c*), *Largan* v. *Bowen* (*d*). In the case of *Paxton* v. *Douglas* (*e*), the creditor had obtained an interlocutory judgment, prior to the application for an injunction. What was the state of the proceeding at law at the date of the decree is not stated, and no question on the subject appears to have been raised.

In some subsequent cases, where the decree had priority in point of time, a question was raised whether the executor, by improper pleading or by confessing judgment,

(*a*) 2 *Dick.* 668.
(*b*) 1 *Bro. C. C.* 183.
(*c*) 2 *Cox*, 201.
(*d*) 1 *Sch. & Lef.* 296.
(*e*) 8 *Ves.* 520.

1836.

LEE v. PARK.

judgment, did not lose his right to be protected by an injunction, and, upon these cases, it has been considered that, if the executor so pleaded as to entitle the creditor Plaintiff at law to a judgment to recover his demand *de bonis propriis*, this Court could not restrain the execution; *Brook* v. *Skinner* (*a*), *Terrewest* v. *Featherby* (*b*), *Drewry* v. *Thacker* (*c*), *Clarke* v. *Lord Ormonde* (*d*), *Lord* v. *Wormleighton.* (*e*) In the cases of *Price* v. *Evans* (*g*), and *Kent* v. *Pickering* (*h*), the Vice-Chancellor granted injunctions which only restrained the creditor from taking out execution against the assets of the intestate or testator; but it has been held that suffering judgment to go by default, or putting in pleas considered false, if done merely for the purpose of gaining time to apply to this Court, did not deprive the executor of his right to protection: *Dyer* v. *Kearsley* (*i*), *Fielden* v. *Fielden.* (*k*) In a useful work on the law of executors (*l*), it has been observed that, in the consideration of some of these cases, some misconception seems to have prevailed respecting the effect of the executor's pleas, and of the judgment against him; and, considering what in the argument of this case has been called the quality of the judgment, it seems proper to notice that a judgment against an executor, whether by default, or on demurrer, or upon verdict on any plea pleaded, except a general or special *plene administravit*, is conclusive upon him that he has assets to answer the demand: *Leonard* v. *Simpson* (*m*), *Palmer* v. *Waller.* (*n*) If the action can only be supported against him in his character of executor,

(*a*) 2 *Mer.* 481. n.
(*b*) 2 *Mer.* 480.
(*c*) 3 *Swanst.* 529.
(*d*) *Jac.* 108.
(*e*) *Jac.* 148.
(*g*) 4 *Sim.* 514.
(*h*) 5 *Sim.* 569.
(*i*) 2 *Mer.* 482. *n.*
(*k*) 1 *Sim. & Stu.* 225.
(*l*) *Williams's Law of Executors*, 1181.
(*m*) 2 *Bing. N. C.* 176.
(*n*) 1 *Mees. & Wel.* 689.

1836.

LEE v. PARK.

ecutor, and he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him is, that the Plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the Defendant have so much; but if not, then the costs out of the Defendant's own goods. Such is the form of the judgment, where the Defendant has pleaded *non est factum testatoris*, *non assumpsit*, or release to the testator, although all of these pleas are held to admit assets; but, upon a subsequent deficiency of assets, the executor has to pay out of his own goods, because, in law, the judgment is held to be a proof that he had assets to satisfy it. Upon the sheriff's return of *nulla bona* the Plaintiff may issue a *scire fieri*; or bring an action of debt on the judgment, suggesting a *devastavit*. In the proceedings on the *scire fieri*, the Plaintiff has not to prove that the executor has property of the testator in his hands, and in the action the executor cannot plead *plene administravit*, but only deny the *devastavit*, and of that the judgment against him, and the sheriff's return of *nulla bona* are evidence, and in this action the creditor obtains judgment to recover his demand *de bonis propriis*. The case of *Drewry* v. *Thacker* (*a*) is, as far as I am aware, the only case in which the executor has been in any degree protected against execution upon a judgment obtained prior to the decree. The administratrix in that case had given *cognovits* to *Stanley* and *Lucas* two bond creditors with stay of execution, if payment was made by instalments at certain times. After default had been made, a decree for administration was obtained, and, after the Plaintiff at law had notice of the decree, the sheriff took the intestate's goods in the hands of the administratrix in execution. The Vice-Chancellor, Sir *John Leach*, ordered

(*a*) 3 *Swanst.* 529.

1836.

LEE v. PARK.

dered the sheriff to restore the goods on payment of costs, and further that if, upon the administration of the estate by the Court, there should be a deficiency of assets to pay *Stanley* and *Lucas* in full, they were to be at liberty to proceed at law against the administratrix, as if the sheriff had returned *nulla bona præter* the sum received by *Stanley* and *Lucas* upon the administration of the assets in this case, she by her counsel undertaking not to dispute the suggestion of such return in the writ at law. Now Lord *Eldon*, very recently before the date of this order, in the case of *Terrewest* v. *Featherby* had observed, "that the creditor's judgment would be of no service to him, if he were delayed here until it could be ascertained, whether there were assets of the testator to answer his demand, which might not be till after all chance of recovering against the executor *de bonis propriis* was entirely gone." The order of the Vice-Chancellor in *Drewry* v. *Thacker* did, however, so delay the creditor; and, on a motion before Lord *Eldon* to discharge the order, he seems to have found considerable difficulty in dealing with it. He clearly considered that, if the administratrix was liable at law, she was liable to a greater extent than she was left by the Vice-Chancellor's order; and that there had been no instance, where the proceedings at law had been restrained after judgment *de bonis testatoris*, and, *si non, de bonis propriis* of an executor, and execution issued on a decree subsequently obtained for an administration of the assets; and he said that his memory furnished him with the recollection of no case in which the Court had interposed as in the Vice-Chancellor's order, namely, by restraining the proceedings at law for a time, but considering those proceedings effectual for some purposes to be carried into execution at a future time, when the fruits to be collected from them had been ascertained by the result of certain proceedings in equity. In the result,

1836.

LEE v. PARK.

result, he made no order upon the motion before him, so that the order of the Vice-Chancellor was in effect left undisturbed; but under circumstances which prevent it from being regarded as an authority.

In the subsequent case of *Clarke* v. *Lord Ormonde* (*a*), in which the point was not raised, Lord *Eldon* is reported to have said that, even if a creditor has got a judgment before a decree, though he may come in and prove as such, he must not take out execution, and in reference to the conduct of the parties, and perhaps to the nature of the claim there may be such cases; but such is not the ordinary rule, and in this particular case, having regard on the one hand to the nature of the suit in equity, the time when the bill was filed, the statements as to the assets in the answer, the time when the decree was obtained, and the absence of any explanation of the state of the assets at this time; and having regard, on the other hand, to the time when the action was brought, and the judgment obtained, the rights which the bond creditors have obtained of having satisfaction out of the assets of the testator, if the sheriff finds them, or if not, upon the sheriff's return, to bring an action which will entitle them to satisfaction out of the goods of the executor — considering also that, if there should be a deficiency of assets, the claimants thereon would, if they suffered, suffer because they used less diligence than the Plaintiffs at law, but would not suffer at all, if the executors were held to have a right to stand against the assets only in the situation in which the creditors would have stood upon a just administration, I think that this motion ought to be refused with costs.

(*a*) *Jac.* 108.

1837.

CARR *v.* APPLEYARD.

April 28.

The Master has no authority under the 3 & 4 *W.* 4. *c.* 94. *s.* 13. to entertain an application for enlarging publication, in the sense of an application for leave to examine witnesses after the depositions on one side have been delivered out, the words "enlarging publication" in that section being restricted to enlarging the time at which publication is to pass.

THIS was a motion, on behalf of the Plaintiffs, to discharge an order for enlarging publication, made by the Master on the 13th of *April* 1837, on the special application of the Defendant under the 3 & 4 *W.* 4. *c.* 94. *s.* 13. The bill was filed in *Hilary* term 1832; publication had been enlarged by consent on several occasions, and in *Hilary* term 1837 publication passed, the depositions of the Plaintiff's witnesses were delivered out to the Plaintiff, and the cause was set down for hearing by the Plaintiff. The application to the Master was supported by the affidavit of the Defendant's solicitor and clerk in court, that they had not seen, read, nor heard read, nor been informed of the contents of the depositions taken by the Plaintiff, and that they would not see, read, nor hear read, nor be informed of the same until the period, to which publication might be enlarged, should have expired; but no similar affidavit by the Defendant himself was produced. The Master made the order to enlarge publication for a month, on condition that the Defendant made the usual affidavit, without requiring any further attendance before him, and, on the following day, the Defendant's affidavit was filed, but not in the usual form, the Defendant stating, that he had not seen, read, nor heard read, nor been informed of the contents of the depositions taken by the Plaintiff, nor would see, &c. save and except that he had been informed by two of the witnesses, shortly after their examination, that such witnesses had been examined, but without disclosing or explaining to the deponent, to the deponent's recollection or belief, the

1837.

CARR v. APPLEYARD.

the answers or evidence such witnesses had given to the interrogatories put to them.

In support of the motion to discharge the order, it was insisted first, that the Master had no jurisdiction, under the 3 & 4 *W.* 4. *c.* 94. *s.* 13. to entertain such an application, which was not an application for enlarging publication within the meaning of the thirteenth section of that act, but the proper subject of a motion to the Court for leave to examine the Defendant's witnesses, after publication had passed. Secondly, it was contended that, if the Master had jurisdiction, the order was irregular, inasmuch as it had been made without the production of an affidavit by the Defendant himself that he had not seen, or been informed of the depositions, which was a necessary condition of enlarging publication, after the depositions on one side had been delivered out; *Whitlocke* v. *Baker* (*a*); and thirdly, that, when the affidavit was afterwards filed by the Defendant, it was in such a form as would have rendered it inadmissible, had it been produced before the Master.

On the other side it was contended that, under the thirteenth section of the act, the Master had exclusive jurisdiction to determine all applications "for enlarging publication;" that that expression was commonly used, upon similar applications, after the depositions had been delivered out; *Lawrell* v. *Titchborne* (*b*); and that the books of practice contained a form of an affidavit in support of a petition to enlarge publication, after publication had passed. (*c*) As to the affidavit, the Defendant stated that he was entirely ignorant of the contents of the

(*a*) 13 *Ves.* 511.
(*b*) 2 *Cox*, 289.
(*c*) 2 *Turn. & Venab.* 19., 6th edit.

the depositions taken in the cause by the Plaintiff, and there could be no doubt that it would have satisfied the Master.

Mr. *Pemberton* and Mr. *Ellison*, for the motion.

Mr. *Parry*, *contrà*.

The MASTER *of the* ROLLS was of opinion, that the words 'enlarging publication' in the third section of the act, 3 & 4 *W.* 4. *c.* 94. must be understood in the strict sense of enlarging the time at which publication was to pass, and that, after that time had expired and the depositions on one side had been delivered out, and something more than the mere enlargement of the time at which publication was to pass was required by the application, the Master had no jurisdiction. This was in substance an application for leave to examine witnesses, after the depositions on one side had been delivered out, and although publication must be enlarged for that purpose, and the application came, therefore, literally within the terms of the act, yet, considering the spirit in which the act had been construed, his Lordship thought that the Master had no authority under the statute to grant such an application. The order must be discharged, but without costs.

On the 1st of *May* a motion was made, on the part of the Defendant, for leave to examine his witnesses notwithstanding publication had passed, and that publication might stand enlarged accordingly until the last day of the ensuing *Trinity* term. The motion was supported by the affidavits which had been produced before the Master, and by the Defendant's affidavit; and, the Court

1837.

CARR v. APPLEYARD.

Court requiring a more effective affidavit from the Defendant, the motion stood over till the next seal (*May* 22d) when, upon the production of an affidavit on the part of the Defendant, stating "positively that he had not seen, read, or heard read, or been informed of the contents of the depositions taken in the cause by the Plaintiff," and of several other affidavits, the Master of the Rolls made an order to enlarge publication according to the terms of the motion.

A motion to discharge that order was made on the 19th of *July* before the Lord Chancellor, and refused with costs. The Lord Chancellor, in refusing that motion, expressed his concurrence in the former decision of the Master of the Rolls as to the jurisdiction of the Master in applications for enlarging publication. (*a*)

(*a*) 2 *Mylne & Craig*, 476.

1837.

BETWEEN

RICHARD THOMAS - - Plaintiff. *April 6, 7*

AND

Sir EDWARD CHOLMELEY DERING, Bart., Sir WILLIAM RICHARD POWLETT GEARY, Bart., and CHOLMELEY DERING, Defendants.

E. D. was beneficially entitled, under his marriage settlement, to an estate for his life, and to the ultimate reversion in fee in default of issue male; and the trustees of the settlement had a power to sell at the request and by the direction of the tenant for life. There was issue of the marriage. *E. D.*, acting as absolute owner, entered into a contract by correspondence to sell the estate to *T*, and the trustees afterwards refused to concur in the sale:

Held, on a bill for specific performance, first, that there was a binding contract between the vendor and purchaser, and that the vendor was bound to perform it, if he was able; secondly, that the vendor ought not to be decreed to request or direct the trustees to execute a conveyance, unless the trustees ought to comply with the request; thirdly, that the trustees had a discretion, under the power of sale, which the Court had no power or jurisdiction to control; and lastly, that the purchaser was not entitled, in such a case, to have the contract performed to the extent of the vendor's interest, by a conveyance of his life estate and his ultimate reversion.

Principles upon which the Court proceeds in determining whether the purchaser is entitled to a partial performance of the contract, with compensation for the deficiency, where the vendor has only a limited interest in the estate contracted to be sold, and is, therefore, incapable of performing the whole contract.

IN the month of *June* 1834, an advertisement appeared in the *Maidstone Journal*, stating that an estate, about three miles from *Maidstone*, consisting of a manor and 682 acres of land, with farm-houses, &c., and affording good pheasant and partridge shooting, was to be sold by private contract, and that further particulars might be obtained by applying to the solicitors therein named.

The Plaintiff, having reason to believe that the estate belonged to Sir *Edward Cholmeley Dering*, authorised his agent, *Wise*, to treat for the purchase of the estate, and *Wise* accordingly addressed a letter to Sir *Edward C. Dering*, requesting to be informed whether the *Thornham Court*

1837.

THOMAS v. DERING.

Court estate was for sale; and if so, what was to be included in the purchase, and what price was desired for it.

To this letter Sir *E. C. Dering* returned the following answer: —

"*Surrenden Dering*, *June* 4th, 1834.—Sir, Mr. *Bacon* has brought me a letter from you, requesting particulars of my estate at *Thornham*, which I am thinking of selling. There are 682 acres, and the gross rental, including underwood, 716*l*. The lowest sum I can take for this is 18,000*l*. With regard to the timber, if any objection was made to taking it by valuation, I should not mind putting a price upon it: from 1500*l*. to 2000*l*. would, I apprehend, be about the sum. This estate is certainly a most eligible investment, as there is no outlay required, and it returns nearly 4 per cent.: should the purchaser be unable to pay the whole amount of the purchase-money, I should not object to 8000*l*. or 10,000*l*. remaining on interest, at 4 per cent. If you should have any occasion to write to me, I shall be at *Oxon Hoath*, *Tonbridge*; and I think it right to apprise you, that I have two parties in treaty for this estate, so that, although it is now in my power to make you the offer, you must not be surprised if in a few days this estate is withdrawn from the market."

To this letter *Wise* sent an answer, dated the 18th of *July* 1834, stating, that his friend thought the timber small, and not worth the expense of marking and measuring; and that he therefore made the offer of 17,500*l*. for the estate, timber included.

On the 19th of *July* 1834, Sir *E. C. Dering* replied, as follows:—

"Sir, —

1837.

THOMAS v. DERING.

"Sir, — In reply to your letter of this morning, I am rather surprised at your offer for the *Thornham* estate. I told you that the lowest price I could take for the farm was 18,000*l.*, the timber not included; and when you consider that a purchaser would make nearly 4 per cent., I appeal to you, as a man of business, whether he can fairly expect more in these times. With regard to your friend's opinion of the timber being small and not worth measuring, I do not think he has come to a very logical conclusion. The timber I know is not large; he will therefore have less to pay. I shall be glad to hear shortly, as I had another applicant on *Thursday*, besides the gentleman who went over it on *Wednesday*. In the present state of the funds I shall be a considerable loser by taking 18,000*l.* for the farm."

On the 21st of *July*, *Wise* wrote an answer to this letter declining further treaty, if Sir *E. C. Dering* could not make any alteration in his offer. On the 23d of *July* Sir *E. C. Dering* wrote a letter, acceding to the proposal of 17,500*l.* for the estate, exclusive of timber. To that letter *Wise* wrote an answer, making another offer, on the part of the Plaintiff, of 18,000*l.* for the estate, timber and all included; to which Sir *E. C. Dering* sent the following letter in reply: —

"*Oxon Hoath*, *Sunday* 27th of *July* 1834, — Sir, In answer to your letter of yesterday, you may inform your friend that, although I am aware the sum he has offered is below the value of the property, I have nevertheless made up my mind to accept his offer. I have this day written to my solicitor to say I have agreed to accept 18,000*l.* for the whole, and he will draw up an agreement immediately. I told him Mr. *Thomas* would probably call on him early this week: I go up to-morrow, and shall return on *Thursday*. Al-

1837.

THOMAS v. DERING.

though I have sold this property for considerably less than I intended, I have to thank you for having mentioned it to Mr. *Thomas*."

In consequence of this letter a negotiation took place betwen the solicitor of the Plaintiff and the solicitors of Sir *E. C. Dering* for the preparation of a formal contract. On the 31st of *July* Sir *E. C. Dering* wrote a letter to his uncle, the Defendant *Cholmeley Dering*, to the following effect:—" I have sold some outlying farms, in order to enable me to purchase nearer home. The price is 18,000*l.*; the net income 680*l.*, which, at twenty-five years purchase, is 17,000*l.*, and leaves 1000*l.* for the timber. Considering the present rate of interest for money, I think it fairly sold."

On the 4th of *August* the Plaintiff applied to Sir *E. C. Dering* for permission to shoot over the land, which was immediately granted.

On the 5th of *September* 1834, the solicitors of Sir *E. C. Dering* delivered to the solicitor of the Plaintiff the draft of an agreement, commencing as follows: — " Sir *E. C. Dering*, so far as he can under the settlement made upon his marriage, but not further, or otherwise, agrees to sell to Mr. *Thomas* all the manor," &c.; and containing various stipulations, to which, as well as to the clause referring to the settlement of which this draft was the first notice, the Plaintiff's solicitor objected.

In consequence of these objections, the solicitors of Sir *E. C. Dering* declined delivering an abstract of title, and on the 3d of *November*, the Plaintiff's solicitor received from the solicitors of Sir *E. C. Dering* the following letter:—" We beg to inform you that Mr. *Cholmeley Dering*,

Dering, one of the trustees of Sir *E. C. Dering*'s settlement, being of opinion that the price proposed by Mr. *Thomas* for the estate at *Thornham* was not sufficient, made inquiries upon the subject, and has by such inquiries confirmed his opinion; and, in consequence, feels it his duty to decline giving his concurrence to the proposed sale. You must, therefore, consider the treaty at an end."

In the month of *December* following, the bill was filed against Sir *E. C. Dering*, praying for the specific performance of the contract. To this bill the Defendant Sir *E. C. Dering* put in a plea, setting forth indentures of lease and release, dated the 6th and 7th of *April* 1832, made on his marriage, whereby the estates therein mentioned, comprising, among others, the *Thornham* estate, were vested in *Cholmeley Dering* and Sir *William Geary*, and their heirs, upon the trusts therein mentioned; namely, to the use of Sir *E. C. Dering* for life, without impeachment of waste, with remainder to the trustees, to preserve contingent remainders; remainder to trustees for a term to secure a jointure to Sir *E. C. Dering*'s mother; remainder to the first and other sons of the marriage successively in tail male, with an ultimate limitation to Sir *E. C. Dering* in fee. And the settlement contained a proviso, that it should be lawful for *Cholmeley Dering* and Sir *W. Geary*, and the survivor of them, and the executors or administrators of such survivor, at any time or times thereafter, at the request, and by the direction of Sir *E. C. Dering* during his life, to dispose of and convey, either by way of absolute sale or exchange, all or any part of the manors, hereditaments and premises thereby limited in strict settlement, and the inheritance thereof in fee simple to any person or persons whomsoever, and for such price or prices in money, or for such equivalent or recompense in lands

1837.

THOMAS v. DERING.

as to the said *Cholmeley Dering* and Sir *W. Geary*, and the survivor, &c., should seem reasonable.

The plea having been overruled, the Plaintiff amended his bill by making *Cholmeley Dering* and Sir *W. Geary* Defendants. The amended bill charged, that the letters and correspondence before stated constituted a valid and binding contract as well upon Sir *E. C. Dering* as upon the Plaintiff, and that it was entered into with the privity and consent of the trustees; and it prayed, that the Defendants might be decreed specifically to perform the same; and that they, and all other necessary parties, might be ordered to join in conveying the purchased estate to the Plaintiff and his heirs, and to deliver up possession of the same to the Plaintiff and his heirs, the Plaintiff being ready on his part specifically to perform the contract.

The Defendant, Sir *E. C. Dering*, by his answer, said, that at the time he carried on the correspondence with *Wise*, he supposed he was only negotiating for the sale of the estate, and never intended that such correspondence should be a binding contract on himself or the Plaintiff. The Defendant set out the indentures of settlement made on his marriage, and stated that there was issue of the marriage one son, *Edward Cholmeley Dering*, who was then living, and insisted that the trustees of that settlement had not in manner and form therein mentioned disposed of, or contracted to dispose of, the premises in question. The Defendant further said, that the correspondence did not contain a proper description of the premises pretended to be the subject of the alleged contract; that the price proposed to be given by the Plaintiff was inadequate; and that, even if he had entered into such contract, it was out of his power to perform the same, the trustees having refused to give their consent to the proposed sale of the estate.

The

The Defendant, *Cholmeley Dering*, by his answer, said, that he never gave his consent to Sir *E. C. Dering* to enter into the alleged contract; that he had been informed of the correspondence between Sir *E. C. Dering* and *Wise* in the month of *May* 1835, and not before; that the advertisement in the *Maidstone Journal* was not inserted with the privity or consent of the Defendant or of his co-trustee, and that he was not acquainted with the contents thereof, or informed that the estate had been advertised for sale until the month of *October* 1834; that the price offered by the Plaintiff was inadequate; and that it would be prejudicial to the interests of Sir *E. C. Dering*, and the other parties for whom the Defendant and Sir *W. Geary* were trustees, to part with the estate; and he submitted that he and his co-trustee would be guilty of a breach of trust, if they concurred in such alleged sale, or executed any instrument for carrying the same into effect.

The Defendant, Sir *W. Geary*, denied, by his answer, that he had authorised Sir *E. C. Dering* to enter into the alleged contract; and he said, that he was wholly ignorant that an advertisement had been inserted in the *Maidstone Journal* for the sale of the estate, until long after the same was so inserted; and that after being informed by Sir *E. C. Dering*, that *Cholmeley Dering* had refused to concur in the proposed sale, he, Sir *William Geary*, also declined to concur in such sale; and he insisted that he had a right so to do.

After the amended bill had been filed, and before the Defendants put in any answer thereto, Sir *E. C. Dering*, having employed workmen to cut down timber upon the *Thornham* estate, a supplemental bill was filed by the Plaintiff for the purpose of obtaining an injunction to restrain the Defendants from committing such waste.

1837.

THOMAS v. DERING.

An *ex parte* injunction was obtained; and a motion to dissolve it was afterwards refused, with costs.

Mr. *Pemberton*, Mr. *Kenyon Parker*, and Mr. *Duppa*, for the Plaintiff.

All that is necessary to constitute, by way of letters, a binding contract, which this Court will carry into execution, is, that the terms of the contract should be ascertained, and that there should be a reasonable description of the subject matter of the contract: *Kennedy* v. *Lee*. (*a*)

It is perfectly clear that Sir *E. C. Dering* is bound to perform the contract into which he has entered, as far as he is able to do so; and the only question is, whether the Court will not compel the trustees to convey the fee-simple of the estate in question to the Plaintiff. Considering the relationship and close intimacy between Sir *E. C. Dering* and the trustees (one of them being his uncle and the other his half-brother), the notoriety of such a transaction as the treaty for this purchase between gentlemen holding the rank and station of these parties, all living in the same neighbourhood, the letter addressed by Sir *E. C. Dering* to his uncle, communicating the fact of the sale, which he considered as an advantageous one, and the absence of all collateral evidence of non-acquiescence on the part of the trustees, it is difficult to abstain from the inference, notwithstanding the answers of the Defendants, that the contract was entered into with the privity and consent of the trustees. Sir *E. C. Dering* assumed the character of absolute owner of the estate, and dealt with the Plaintiff upon that footing; and considering the long interval which elapsed

(*a*) 3 *Mer.* 441.

elapsed between the acceptance of the Plaintiff's offer by Sir *E. C. Dering*, and the time at which the refusal of the trustees to concur in the sale was first communicated to the Plaintiff, the Court will presume that the trustees acquiesced in the contract, and compel them to complete it. The power of sale gives no discretion to the trustees, except as to the price; and, if the price is inadequate — though there is no pretence for the alleged inadequacy — Sir *E. C. Dering* must make good the insufficiency. There are three alternatives; first, that the surviving trustee (Mr. *Cholmeley Dering* having died since the institution of the suit) be directed to convey the legal fee to the Plaintiff; or that Sir *E. C. Dering* be ordered to exercise, under the power, his right of directing the trustees to convey the estate; or, if the Court should be of opinion that the trustees cannot be compelled to convey, as against the interests of other parties interested under the settlement, then that Sir *E. C. Dering* be compelled to convey his life-interest and his reversion in fee, a compensation, out of the purchase-money, being allowed to the Plaintiff for the deficiency. The rule is well settled, that where a vendor misrepresents the quantity of interest which he possesses, but is able to perform his contract to a certain extent, the purchaser is entitled, if he chooses, to take such interest as the vendor can give him, with an abatement: *Mortlock* v. *Buller*. (*a*) *Neale* v. *Mackenzie*. (*b*)

Mr. *Kindersley* and Mr. *Richards*, for the Defendant Sir *E. C. Dering*.

The advertisement contained no particulars of the estate offered for sale; and there is nothing in the correspondence

(*a*) 10 *Ves.* 316. (*b*) 1 *Keen*, 474.

1837.

THOMAS v. DERING.

spondence to define with sufficient certainty the subject matter of the treaty, so as to constitute a binding contract. The trustees, in the exercise of the discretion given to them by the power, have sworn that they should consider themselves guilty of a breach of trust, if they consented to the proposed sale. Sir *E. C. Dering*'s direction to convey would be nugatory, unless the trustees acquiesced in the propriety of the sale; for the request and direction of the tenant for life are, by the terms of the settlement, subject to the approbation of the trustees, and the Court has no authority to control the exercise of the discretion so reposed in them. As to a conveyance by Sir *E. C. Dering* himself of such interest as he has, no such relief is asked by the bill; and the Plaintiff cannot obtain it in a suit which is not framed for that purpose. Even if that objection could be removed, the Court cannot make a decree against Sir *E. C. Dering*, the effect of which would be to substitute a totally different contract for that which was in the contemplation of either party. Sir *E. C. Dering* is tenant for life without impeachment of waste, under the settlement, with remainder to his son, in tail; and though the power which he may exercise in that character, considering the relation in which he stands to his children, is not likely to be abused, and for that reason may have been readily given to him by the parties to that instrument, how can the Court give a life estate without impeachment of waste, and the ultimate reversion to a stranger, without prejudice to the interests of the intermediate *cestuis que trust?* The contract, if there was a contract, is one which it is impossible to execute in a manner by which justice can be done between all parties who are interested in its execution, and falls therefore within that class of cases in which the purchaser must be content to abandon any advantage which he expected to derive from his purchase;

chase; *Bennet College* v. *Carey* (*a*), *Crop* v. *Norton* (*b*), *King* v. *King*. (*c*) The Court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will it, in such case, substitute the Master for the arbitrator, which would be to bind the parties contrary to their agreement; *Agar* v. *Macklew*. (*d*) In the present case it is no less out of the power and beyond the jurisdiction of this Court to substitute any discretion for that which has been expressly reposed in the trustees by the parties to the settlement; and, as to the proposed partial execution of the contract, there is a tenant in tail in existence, and it is impossible to say how large a portion of the interest may be comprised in the intermediate estates which the tenant for life cannot convey. The Court, therefore, will not deal with this case as it might in cases where the deficiency which is to be the subject of abatement is inconsiderable, or capable of being easily ascertained; *Hill* v. *Buckley* (*e*), *Wheatley* v. *Slade*. (*g*)

Mr. *Barber* and Mr. *Turner*, for the trustees.

The trustees positively deny, by their answer, that they knew of the advertisement, or in any manner authorised or assented to the sale: and even if they had incautiously assented to it, the Court would not refuse them a *locus penitentiæ*, since they would be liable to all the consequences of a concurrence in an improvident sale; *Bateman* v. *Davis*. (*h*) The trustees have sworn, that they not only consider the price inadequate, but that it would be prejudicial to the interests of the intermediate *cestuis que trust*, to sell the estate. To direct them or the

(*a*) 3 *Bro. C. C.* 390.
(*b*) 2 *Atk.* 74.
(*c*) 1 *Mylne & Keen*, 442.
(*d*) 2 *Sim. & Stu.* 418.
(*e*) 17 *Ves.* 394.
(*g*) 4 *Sim.* 126.
(*h*) 3 *Mad.* 98.

1837.

THOMAS v. DERING.

the survivor of them to execute a conveyance to the Plaintiff, would, therefore, be in effect to direct them to commit a breach of trust; and the Court has no power to control their discretion even if they had, in the first instance, been assenting parties to the treaty, which allegation, however, is distinctly denied. No decree, moreover, can be made either for a conveyance of the fee, or for the partial execution of the contract in the absence of the tenant in tail.

Mr. *Pemberton*, in reply.

The conduct of the trustees is irreconcilable with their answer, and with any other conclusion than that they authorised and consented to the sale; and, if they authorised the sale, the surviving trustee is bound to execute a conveyance. If, however, the contract cannot be executed to its full extent, Sir *E. C. Dering* is, at any rate, bound to perform it to the extent of his own interest in the estate. This is a less degree of relief than that which is sought by the bill, and therefore involved and included in the prayer for the greater relief. It is no valid objection, that, because the whole of the relief sought by the bill cannot be given, the Court may not grant a part of it, though such part may not be specifically prayed for.

The MASTER *of the* ROLLS (after stating the facts.)

It is impossible to read this correspondence without coming to the conclusion that Sir *Edward Dering*, in the treaty for the sale of this estate, acted as the owner of the estate, or as a person who, being in the possession of the estate, had the power of selling it. I have no hesitation in saying that, by the offer made and accepted as it appears to have been in this correspondence, a binding contract was completed between these parties.

It

1837.

THOMAS v. DERING.

It is true, that mention is made in the letters of an intended formal contract, to be afterwards drawn up; but there are many cases in which a correspondence, referring to the future execution of a more formal agreement, has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case. I am of opinion, therefore, that Sir *Edward Dering* was on the 27th of *July* 1834, bound by his contract to sell this estate. What the result may be in this case will depend on questions involving very different considerations from the mere binding nature of the contract between these parties.

The contract having been entered into, Sir *Edward Dering* was himself bound to perform it, if he could; but he could not perform it without the concurrence of the trustees, and the trustees did not concur. The next question, then, is, whether the trustees are bound to concur; and the argument, on behalf of the Plaintiff, is, that, from the circumstances of this case, the Court must necessarily infer that they either authorised Sir *Edward Dering* to enter into the contract as their agent, or that they so far acquiesced in what he had done, that he must be considered as their agent. And certainly the circumstances of this case are somewhat extraordinary, when the relation between the parties is considered. Mr. *Cholmeley Dering*, the uncle of Sir *Edward Dering*, and Sir *W. Geary*, his half-brother, were living in the same neighbourhood, and on the most affectionate and confidential terms with Sir *Edward Dering;* and at the very time when this contract was in preparation, Sir *Edward Dering* was residing in the house of Sir *W. Geary*. The trustees have, however, sworn that no communication on the subject was made to them. There was an advertisement for the sale of the property in question in the month of *June;* all these parties read the

1837.

THOMAS v. DERING.

the newspapers; but the trustees have stated, in their answers, that they knew nothing of this particular advertisement.

The question is, whether under such circumstances there is sufficient ground to induce the Court to presume that Sir *Edward Dering* was authorised by the trustees to enter into the contract; and I am of opinion that there is not sufficient ground for that presumption.

The trustees are empowered by the settlement to sell at the request of the tenant for life; and the next question is, whether Sir *Edward Dering* is bound to make that request. His conduct, it must be admitted, is open to much observation. He assumed to act as absolute owner of the estate, or at least as a person entitled to sell it; and after the objection, on the part of the trustees in whom the legal estate was vested, which seems to have been made on the 2d of *August*, he never communicated that objection to the person with whom he had entered into the contract, but, on the contrary, gave instructions to his solicitor to prepare a formal agreement. It seems strange that it never occurred to a gentleman of Sir *Edward Dering*'s station, that, when the objection was raised by the trustees, or one of them, it was his bounden duty to communicate that objection to the person with whom he had entered into the contract.

The draft of the agreement, which was sent on the 5th of *September* to the Plaintiff's solicitor, contained the first intimation that Sir *Edward Dering* had not the absolute power of selling this estate. This led to the discussion between the solicitors, which ended in the letter of the 3d of *November* declaring the treaty to be at an end, and in the institution of this suit.

With

1837.

THOMAS v. DERING.

With respect to the point which has been raised, whether Sir *Edward Dering* can now be called upon to request or direct the trustees to convey, I think that he ought not to be called upon to do so, unless it shall appear that the trustees, when requested or directed, ought to comply with the request; and, without at present determining this point, the strong inclination of my opinion is, that the power of sale does give a discretion to the trustees in relation to all the matters comprised in the terms of the power, and that this Court has no power or jurisdiction to interfere with the discretion so vested in the trustees.

It is a general principle, subject, however, to some important qualifications, that, if a party enters into a contract to sell an estate, and it turns out that he is unable to complete his contract, but is nevertheless able to perform a part of it, the Court will compel him, if the purchaser chooses, to execute as much of the contract as he is able. There may be a difficulty, in ascertaining the amount of abatement out of the purchase-money to which the purchaser would be entitled, arising out of the nature of Sir *Edward Dering*'s interest, which consists partly of a tenancy for life without impeachment of waste, and partly of the ultimate reversion; but, if Sir *Edward Dering* is exposed to any difficulty from this cause, he has brought it entirely upon himself. As to this point, and on the construction of the power of sale, I shall reserve my judgment.

On a subsequent day his Lordship delivered the following judgment on the reserved points: —

In the month of *July* 1834, the Defendant, Sir *Edward Dering*, conducting himself as if he were the absolute owner of the estate in question, or as if he had an

1837.

THOMAS v. DERING.

an absolute power to dispose of it, agreed to sell the estate to the Plaintiff for 18,000*l*.. It afterwards appeared that the estate did not belong to Sir *Edward Dering* absolutely, but was vested in trustees, who had a power to sell at the request of Sir *Edward Dering*; and that Sir *Edward Dering* was himself beneficially entitled to the estate for his life without impeachment of waste, and to the ultimate reversion in fee, in default of issue male by his present marriage, of which there is issue now living.

I have before stated that I considered the contract binding upon Sir *Edward Dering*, but not upon the trustees; and it appears to me, upon the true construction of the settlement under which the trustees hold the estate, that they have a discretion which would entitle them to refuse to concur in a sale requested by Sir *Edward Dering*; and that, in the absence of any imputation upon them, this Court ought not to interfere with that discretion.

The Plaintiff, however, expressed a desire to take such interest as Sir *Edward Dering* alone could give, upon having a proper abatement made from the purchase-money, and the case stood over to give me an opportunity of considering whether the partial execution of the contract could properly be decreed in this case. There are, certainly, authorities to show that this Court has jurisdiction to compel a vendor, who has misrepresented the extent of his interest, to convey that which he really has, and to make a corresponding abatement from the purchase-money.

In *Mortlock* v. *Buller* (*a*), Lord *Eldon* thus expresses himself: — "I agree if a man, having partial interests in an

(*a*) 10 *Ves.* 315.

1837.

THOMAS v. DERING.

an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, that he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and, if the vendor chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole." In the case of *Dale* v. *Lister* (*a*), a bill was filed against the vendor for the specific performance of an agreement for the sale of leaseholds held under the dean and chapter of *Norwich*, to which the defendant represented himself to be absolutely entitled. As to twenty-four acres, part of the leaseholds, he was not absolutely entitled; the same were in effect limited to him for life, with remainder to his sons and daughter in tail. To this part the vendor could not make a good title beyond his own life; he admitted that the plaintiff might put an end to the contract; but insisted that he, the vendor, ought not to be compelled to take less than the stipulated price. A specific performance with a reduction of the purchase-money was decreed; but from the observations made upon the case by Lord *Eldon* in *Milligan* v. *Cooke* (*b*), there appear to have been circumstances which make the decision questionable.

Again, the case of *Milligan* v. *Cooke* (*b*) was a bill for a specific performance filed against the vendor, who had represented his interest in certain leasehold estates to be greater than it really was. Lord *Eldon* decreed that the contract ought to be specifically performed and carried

(*a*) cited 16 *Ves.* 7. (*b*) 16 *Ves.* 1.

1837.

THOMAS v. DERING.

carried into execution, so far as the Defendant was able to perform the same; and after clearly defining what, in his view, was the interest which the vendor had offered for sale, and the interest which he really had, he directed an inquiry what was the difference between the value of the interest represented, as proposed for sale, and the actual interest of the vendor in the lease. The decree provided for the case of the Master being unable to ascertain such difference in value, and the purchaser being willing to take such interest as could be given to him with an indemnity.

But the statement we have of the cases, in which the jurisdiction has been asserted, shews that there are great difficulties in acting upon it in cases which are not very clear and simple.

Though the vendor cannot be heard to suggest the difficulties which he has occasioned, the Court cannot avoid them. It is impossible not to see that the *cyprès* execution of the contract which is given in these cases is in fact the execution of a new contract which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price. It is more easy to compute a just compensation, when it is to be given for the defect in the quantity or the quality of the land sold, than when it is to be given for the deficiency of the vendor's interest; and, when the property is the subject of a family settlement, the alienation of a partial interest, though within the power of the vendor, may be prejudicial to some of the objects for whose protection the settlement was made. I therefore apprehend it to be clear that the Court will not, in all cases, afford the sort of relief which is here asked. Lord *Redesdale*, indeed, seems to have considered that the jurisdiction was confined within narrower

narrower limits than was stated by Lord *Eldon* in *Mortlock* v. *Buller*. In *Lawrenson* v. *Butler* (*a*) Lord *Redesdale* said "that, if there was concealment or an ignorance of the facts on the one part, and that thereby the other party was led into a situation from whence he could not be extricated, then he would have a right to have the agreement *cyprès*, that is, a new agreement is to be made between the parties; but in a case in which it was clear that the vendor could not have compelled a specific performance, and where nothing had been done under the agreement, he seemed to consider that the principle could not be applied; and in the subsequent case of *Harnett* v. *Yielding* (*b*), he says that "if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in cases where an injury would be sustained by the plaintiff in case he were not to get such an execution of the agreement as the defendant can give.

But without derogation, in any respect, from the jurisdiction, it is apparent that the Court will not, in every case, compel a vendor to convey such estate as he can; and omitting on this occasion those cases in which the purchaser, at the time of the contract, knew of the limited interest of the vendor, or in which an attempt has been made to commit a fraud on a power, which have no application to the present case, I apprehend that, upon the general principle that the Court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the Court, before directing

(*a*) 1 *Sch. & Lef.* 13. (*b*) 2 *Sch. & Lef.* 553.

1837.

THOMAS v. DERING.

directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor. Here the vendor has a life estate without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement and the protection intended to be afforded to the objects of it — conceiving that the consequence of a partial execution of this contract might be prejudicial to those objects — seeing the difficulty of ascertaining, upon satisfactory grounds, the just amount of abatement from the purchase-money, and considering, also, that nothing has been done upon the contract, so that the purchaser, though suffering the disappointment of not making himself owner of an estate he desires to possess, has sustained no damage for which compensation may not be given by a jury, it appears to me that, in this case, I ought not to decree a conveyance of the vendor's life estate and ultimate reversion to the purchaser. The bill must therefore be dismissed, but without costs.

Bill dismissed accordingly.

1836.

CHALIE *v.* PICKERING.

June 13.

THIS was a motion on behalf of *George Spencer Ridgway*, the messenger of this Court, for an injunction to restrain the Defendant *Pickering* from proceeding in an action brought against the messenger for an alleged trespass. It appeared that the bill was filed to foreclose the Defendant's equity of redemption in an estate, which he had mortgaged to the Plaintiff, and that the Defendant being in contempt for want of an answer, a warrant, dated the 18th day of *November* 1834, was obtained by the Plaintiff to apprehend the Defendant, and bring him to the bar of this Court to answer for his contempt. The messenger's deputy took the Defendant into custody at his residence in the county of *Chester* on the 25th day of the same month of *November*. The Defendant, who was upwards of eighty years of age, was in a debilitated state of health, and upon the representations of the Defendant's housekeeper, confirmed by the certificate of his medical attendant, that he could not be removed without great risk of his life, the officer was induced to remain at the Defendant's house until the 18th of *January* 1835, when he received a letter from the Plaintiff's solicitors, authorising the Defendant's discharge on payment of his fees, and the Defendant was accordingly discharged. That letter was sent in consequence of an arrangement effected by the mediation of Mr. *Ridgway*, by which the Defendant had consented that the bill should be taken against him *pro confesso*, provided the proceedings were stayed for six weeks, to enable the Defendant to procure a transfer of the mortgage. On the 2d of *December* 1835, the Defendant com-

Where an irregularity has been committed by an officer of the Court in executing its process, the Court will not permit a party to proceed in an action at law against its officer, but will refer it to the Master, in a proper case, to settle a compensation.

Where from the circumstances, it appeared impossible to make out a case for damages, the Court granted an injunction to restrain a party from proceeding in an action of trespass brought against the messenger of the Court, and ordered the Plaintiff at law to pay the costs of the application.

1836.
CHALIE
v.
PICKERING.

commenced an action of trespass in the Court of Exchequer, stating his cause of action to be the breaking and entering his dwelling house on the 16th of *January* 1835, and remaining therein until the 18th of *January* in the same year. The action was founded on the 1 *W.* 1. *c.* 36. 5th rule, by which it is enacted that " where the defendant is in the custody of the serjeant-at-arms, or of the messenger, upon an attachment or other process, the Plaintiff shall within ten days after his being taken into custody, or if the last of such ten days shall happen out of term, then within the first four days of the next ensuing term, cause the defendant to be brought to the bar of the Court; and in case any such defendant shall not be brought to the bar within the respective terms aforesaid, the sheriff, gaoler, or keeper, serjeant-at-arms, or messenger, in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of contempt." The last of the ten days after the 25th of *November*, when the Defendant was taken into custody, happened out of term, and the Defendant ought, therefore, according to this provision of the act, to have been discharged by the messenger within the first four days of *Hilary* term, which commenced on the 12th day of *January* 1835.

The facts above stated were supported by the affidavits of the messenger and his officers; no affidavit was filed on the other side.

Mr. *James Russell* and Mr. *Bevan*, in support of the motion.

The action was brought by the Defendant upon the ground that he was illegally detained on the 17th and 18th of *January*, the statute requiring that he should have

1836.

CHALIE v. PICKERING.

have been brought up to the bar of the Court on the 16th, but the state of his health being such that, according to the certificate of his medical attendant, he could not be removed without great risk of his life, and the officer having, out of a humane regard to the representations made upon this subject, consented to remain in the Defendant's residence for a period of two months. In strictness an irregularity was committed, but, upon the merits, the Defendant, who was so much indebted to the forbearance of the officer, and whose life might have been put to hazard by a strict compliance with the letter of the act, has not the slightest pretence for complaining of that irregularity. It is well settled that where an irregularity has been committed in executing the process of the Court, this Court will interfere to prevent or stay an action against its officer. *Pract. Reg.* (*a*), *May* v. *Hook* (*b*), *Frowd* v. *Lawrence* (*c*), *Aston* v. *Heron.* (*d*) Where a sufficient case is made, the Court will refer it to the Master to settle a compensation; but in a case like the present, where there is a total absence of all merits, the Court, it is submitted, will not only grant the motion, but, following the course adopted in a late case of *Andrews* v. *Walter*, order the Defendant to pay the costs of the application, in the terms of the notice of motion.

Mr. *Pemberton, contrà.*

The case of *Ashton* v. *Heron*, which has been referred to in support of this motion, is, in effect, an authority against the application, for in that case Lord *Brougham*, while he admits the right of the Court of Chancery to prevent any other tribunal from examining questions arising out of the execution of its orders, observes that it

(*a*) p. 246. edit. *Wyatt.*
(*b*) stated in 1 *Dick.* 619.
(*c*) 1 *J. & W.* 655.
(*d*) 2 *Mylne & Keen*, 390.

1836.
CHALIE
v.
PICKERING.

it is not bound, upon any principle, to exclude such concurrent jurisdiction in every case; and he adds that, if the case before him had disclosed any irregularity proper for the cognisance of the common law courts, he should, without hesitation have permitted the action of trespass to proceed. (*a*) Now it is not denied, in the present case, that there was a wrongful imprisonment, which is a proper subject for the cognisance of a common law court. The Court will not assume, upon *ex parte* affidavits, that the messenger's officer resided for two months in the house of the Defendant for the sole purpose of consulting the Defendant's comfort and accommodation; nor will it interfere to stop a legal proceeding in vindication of the rights of the subject, and involving a question of so much importance as personal freedom, unless some strong ground is shewn for its interference. Even if the Court should be inclined to grant the injunction, the Defendant is entitled to a reference to the Master to assess the damages which he has sustained. (*b*)

The MASTER *of the* ROLLS.

The jurisdiction of this Court has been long established with reference to acts done by its own officers in the discharge of their duty. Even where an irregularity has been committed by an officer of the Court, it will not allow an action to be brought or continued against him, but will, in a proper case, refer it to the Master to settle a compensation. If any case had been made out, on the part of this Defendant, I should have directed a reference to the Master in the usual course. On the 25th of *November* this Defendant was taken into custody at his own house, and, as he was then in such a state of health that it was impossible, without risk

(*a*) 2 *Mylne & Keen*, 397.

(*b*) *Phillips* v. *Worth*, 2 *Russ. & Mylne*, 638.

risk of his life, to remove him, the officer, out of tenderness to him, remained in his house. It was only from the continued ill health of the Defendant that the rule, requiring that he should be brought to the bar of the Court, was not literally acted upon before the 16th of *January*, and the terms of the act complied with. Under such circumstances it seems to me impossible that the Defendant can make out a case for damages before any tribunal. The motion must, therefore, be granted, and also the costs of the application, according to the terms of the notice of motion.

1837.

CHALIE *v.* PICKERING.

Injunction granted, with costs of the motion.

BUXTON *v.* BUXTON.

July 28.

ANN BUXTON, by her will, dated the 19th of *June* 1816, devised her real estates to trustees upon trust to sell and invest 12,000*l.* in the funds, and to stand possessed thereof upon trust, as to one-third, for her daughter *Mary* for her life, and after her decease, upon trust for her children equally, and if she should die without children, then upon trust for the benefit of the testatrix's other daughters and their children in manner therein mentioned. And the testatrix made similar provisions as to the remaining two-third parts

A testatrix having, under the will of her mother, a power of appointing by will to a sum of 2000*l.*, and also an interest in the residue of her mother's personal estate, gave legacies of 1000*l.*, 500*l.*, and 500*l.* She then gave 21*l.* to each of her executors, and proceeded as follows: — "Forasmuch as the amount of my property is not yet ascertained, the same awaiting the settling of my late mother's affairs, my will is that, if my money and personal estate should not be sufficient to pay the said legacies in full, the legatees shall make an abatement." She then disposed of her furniture, plate, &c. and of the residue of her money and personal estate:

Held, that the testatrix's will was not an execution of her power.

1837.

BUXTON v. BUXTON.

parts of the 12,000*l.*, directed to be invested, for her other two daughters. The will contained a proviso, that in case any one or more of her daughters should happen to die unmarried, then it should be lawful for her trustees or trustee for the time being to raise out of the third part or share of such daughters so dying unmarried, any sum or sums of money not exceeding in the whole the sum of 2000*l.* sterling, and to pay the same to such person or persons in such manner as each such daughter so dying should, by her last will and testament in writing, or any codicil or codicils thereto, or any writing in the nature of or purporting to be her last will and testament or codicil, direct and appoint.

By a codicil to her will, the testatrix reduced the 12,000*l.* so directed to be invested, to 10,500*l.*, and out of the residue of the monies arising from the produce of the sale of her real estates, after the appropriation of the 10,500*l.* for the benefit of her daughters, she gave the legacies therein mentioned, and she directed that the residue of the sale-monies, if any, should fall into the residue of her personal estate; and by another codicil she gave the residue of her personal estate equally between all her children.

The testatrix died on the 2d of *May* 1830, leaving three sons and three daughters surviving her.

Mary Buxton, the daughter above named, died unmarried, having made her will, dated the 4th of *March* 1831, in the following words: — "This is the last will and testament of me, *Mary Buxton*, of *Cambridge*, in the county of *Cambridge*, spinster. First, I give to my sister *Keziah*, the wife of the Reverend Dr. *Richard Ramsden*, the sum of 1000*l.* Also to my niece

niece *Martha*, the wife of *Frederick Randall*, the sum of 500*l.*: also to my niece *Anna Maria Arnold* the like sum of 500*l.* Also I give to each of my executors the sum of 21*l.*; and inasmuch as the amount of my property is not yet ascertained, the same awaiting the settling of my late mother's affairs, my will is, that if my money and personal estate should not be sufficient to pay the said legacies in full, each of the said legatees shall respectively make a rateable and proportionable abatement of their respective legacies. And as to all my furniture, plate, china, and wearing apparel, excepting such things as I may otherwise dispose of by any written directions in my own handwriting, I give the same to my said niece *Anna Maria Arnold.* And all the rest, residue, and remainder of my money and personal estate, I give to and amongst the children of my brother *Isaac Buxton*, that shall be living at my decease, equally to be divided between them, share and share alike.

The question was whether the will of *Mary Buxton* was a good execution of her power.

Mr. *Cooper*, Mr. *Spence*, Mr. *Rogers*, and Mr. *Wilbraham*, for parties entitled in default of appointment.

As there is no reference either to the power or to the subject of the power, the will cannot operate as an execution of the power: *Sir Edward Clere's case* (*a*), *Andrews* v. *Emmot* (*b*), *Webb* v. *Honnor* (*c*). The circumstance of the testatrix having given the sum of 2000*l.* in legacies, and 21*l.* to each of her executors can raise no inference which can be judicially acted upon as to her having had in her contemplation the

(*a*) 6 *Co.* 18. *a.*
(*b*) 2 *Bro. C. C.* 297.
(*c*) 1 *J. & W.* 352.

1837.

BUXTON v. BUXTON.

the sum over which she had a power of disposition. In *Jones* v. *Tucker* (*a*) the testatrix, who had a power of appointing by will to 100*l.*, bequeathed the exact sum, together with her household furniture, plate, &c., and yet Sir *W. Grant*, though he had no doubt in his own private opinion as to the intention of the testatrix, held that the bequest could not operate as an execution of the power. The testatrix directs an abatement of these legacies, if the amount of *her* property or of *her* money and personal estate, which she describes as contingent upon the settling of her mother's affairs, should be insufficient to pay them. As she had an interest in the residue of her mother's personal estate, there is nothing in this part of the will which might not well apply to that part of her property which she might derive from that source; and there is, consequently, nothing to raise an inference that she erroneously described that property over which she had only a power of disposition as *her* money and personal estate. She afterwards disposes of the rest and residue of *her* money and personal etaste, so that, although her intention possibly might be to exercise her power, there is no reference to the subject of the power which can enable the Court to give effect to that intention.

Mr. *Pemberton*, *contrà*, admitted, that although the disposition of the exact sum over which she had a power of disposition could leave no doubt of her intention to execute her power, yet that circumstance would not, according to the decided cases, be sufficient, unless she had referred to the instrument which created the power; but he contended that, in this case, there was a reference to that instrument, inasmuch as she referred to the possibility of her mother's property not

(*a*) 2 *Mer.* 533.

not being sufficient to satisfy the legacies she had previously given by way of appointment. She first appoints to the 2000*l.* by giving legacies to that exact amount; she next gives twenty guineas to each of her executors, of course out of her personal estate, and then directs that if, upon the settling of her mother's affairs, there should not be sufficient to pay the 2000*l.* over which she had just exercised her power, and if her own money and personal estate should not be sufficient to make good the deficiency, then the legatees should make a rateable abatement. She then proceeds to dispose of her furniture, &c. and of the residue, if any, of her personal estate. The division between that part of her will in which she disposes of the property over which she had a power of disposition, and of the property which did or might constitute her personal estate is plainly distinguishable, and there is a sufficient reference to her mother's will, the instrument creating the power. He referred to *Hughes* v. *Turner* (*a*), a case in which this subject had been much considered, and in which the decision of Sir *John Leach* had been reversed upon a rehearing before the present Lord Chancellor, when Master of the Rolls.

Mr. *Cooper*, in reply.

The MASTER *of the* ROLLS was of opinion that the will of *Mary Buxton* was not an execution of her power.

(*a*) Now reported in 3 *Mylne & Keen*, 666.

1837.

Aug. 4.

COVENTRY *v.* COVENTRY.

The trustees of a marriage settlement, being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant for life, in repeatedly charging the trust estates and funds with annuities and other incumbrances, filed a bill to be discharged from the trusts, and for the appointment of new trustees under the direction of the Court.

The Court granted the relief sought by the bill, and ordered the costs to be paid out of the interest of the tenant for life.

THE bill was filed by the Earl of *Coventry*, Sir *Roger Gresley*, and the Hon. *George Paulett*, who were the trustees of the settlement made on the marriage of *Thomas William Coventry* and his wife, against *Thomas William Coventry* and his wife, and the children of the marriage, and against the trustees of the *Westminster Life Insurance Society* and other parties, incumbrancers upon the property in which *Thomas W. Coventry* was interested as tenant for life under his marriage settlement.

The bill, after stating the marriage settlement, and that the marriage took effect in *July* 1823, proceeded to state four indentures of assignment, dated respectively in *April* 1827, *June* 1827, *March* 1828, and *August* 1833, by which *Thomas W. Coventry* assigned his life interest in the several trust-funds, comprised in the settlement, therein mentioned, to the trustees of the *Westminster Life Insurance Society*, for securing to them the several annuities therein mentioned. It then stated an indenture whereby *Thomas W. Coventry* covenanted to indemnify the parties thereto, who had become bail for him in a certain action, and demised to them certain hereditaments comprised in the settlement for ninety-nine years, if he should so long live, by way of further security upon the trusts therein mentioned The bill stated other annuities and incumbrances charged upon the life-interest of *Thomas W. Coventry* in the estates or funds comprised in the settlement, and that the estates comprised therein had been sold by the Plaintiffs at his request, by virtue of a power given to them by the settlement, and

1837.

COVENTRY v. COVENTRY.

and that the produce of such sale had been invested by the Plaintiffs in the purchase of 3 per cent. bank annuities; and that such trust-funds had been charged by *Thomas W. Coventry* with another annuity, and that notices of the several incumbrances and assignments of his interest in the trust-funds had been served upon the Plaintiffs, and that the Plaintiffs were made responsible, as they were advised, for the due application of the interest and dividends of the trust-funds to the payment of the several annuities and charges, they never having contemplated, when they consented to become the trustees of the settlement, that they should be exposed to such liabilities, but intending only to undertake the trusts for *Thomas W. Coventry* and his family. The bill stated that, for these reasons, the Plaintiffs were desirous of being discharged from the trusts of the settlement, and that they had applied to the Defendant *Thomas W. Coventry* to appoint new trustees in their place, and that such applications had not been complied with; and it prayed that they might be discharged from being trustees of the trust-funds under the settlement, and that proper persons might be appointed in their place under the direction of the Court, and that their costs, charges, and expenses might be paid.

The decree sought by the Plaintiffs was not resisted by any of the Defendants, and the only question was, whether the costs were to be borne by the tenant for life, or to be paid out of the trust funds.

Mr. *Pemberton*, for the Plaintiffs.

Mr. *Beales*, for the tenant for life.

Mr. *Paynter*, Mr. *Parry*, Mr. *Beavan*, and Mr. *Elmsley*, for the other Defendants.

The

1837.

COVENTRY v. COVENTRY.

The MASTER *of the* ROLLS.

The relief sought by the Plaintiffs is to be discharged from the trusts of the settlement, made on the marriage of *Thomas W. Coventry* and his wife, and to have new trustees appointed under the direction of the Court, it appearing upon the pleadings that, in consequence of the embarrassed state of the fund occasioned by himself, the tenant for life has been unable to procure new trustees. Are these trustees, under the circumstances stated in the bill, to go on in the execution of a trust which they undertook only for the benefit of the tenant for life and his family, but which, by his conduct, has involved them in difficulties and responsibilities which they never contemplated? I am of opinion that they are not. I had lately occasion to consider (*a*) the case of a trustee coming without any reason to be discharged from the trust at the expense of the estate, and I did not think that the estate ought to bear the expense. These trustees do not seek to be discharged without reason, but in consequence of the acts of the tenant for life, and being of opinion that they are entitled to the relief sought by the bill, the only question is, who are to pay the costs. Are the trustees to pay them? Certainly not; neither ought the estate, under the circumstances, to be burthened with the costs, and I think they will be properly paid out of the interest of the tenant for life.

(*a*) *Howard* v. *Rhodes*, 1 *Keen*, 581.

1837.

DOWSON *v.* BELL.

June 28.

A testator devised all and singular the rents, issues, and profits of his copyhold lands, to be applied to the maintenance of his children, until the youngest should have attained twenty-one, subject in the meantime and charged with an annuity to his wife, so long as she should continue his widow, and upon his youngest child attaining twenty-one, he devised all and singular his said copyhold lands among all his children equally; and he devised all and singular his freehold tithes and lands upon the same trusts as he had declared respecting his copyhold estates, subject to the annuity to his wife; and he bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow:

Held, that the widow was entitled both to the benefits given by the will and to her dower.

GEORGE *DOWSON*, by his will, dated the 26th of *January* 1816, after reciting that he had surrendered certain copyhold messuages and lands to the use of *John Bell* and *John Simpson*, to hold to them and their sequels in right upon the trusts of his will, devised, declared, and appointed that all and singular the rents, issues, and profits of his copyhold messuages, lands, tenements, and hereditaments therein described should be paid and applied towards the maintenance and education of all his sons and daughters, and such child or children as his wife *Hannah Dowson* might be *enceinte* with at the time of his decease, until the youngest of them should have attained the age of twenty-one years, but subject nevertheless and in the mean time charged and chargeable with the payment of the annuity, yearly rent-charge, or sum of 12*l.* to his wife, so long as she should continue his widow, and which annuity he thereby directed should be paid to her by equal half-yearly payments, the first payment to commence and be made within six calendar months next after his decease, and with such power and remedies in case of non-payment thereof, as landlords were by law entitled to for recovering of arrears of rent; and, upon his youngest child attaining his or her age of twenty-one years, then he gave, devised, and bequeathed all and singular the said copyhold messuages, lands, tenements, and hereditaments and premises, with the appurtenances, equally unto,

1837.

DOWSON v. BELL.

unto, between, and amongst all and every his children then living, their respective heirs, sequels in right, and assigns for ever, to take as tenants in common. The testator there gave and devised all his freehold tithes, and all his freehold messuages, lands, tenements, hereditaments, and premises, situate as therein described or elsewhere, unto the said *John Bell* and *John Simpson* upon the same trusts, and for the same ends, intents, and purposes as were thereinbefore expressed and declared, concerning his copyhold or customary estates (subject also to the payment of the said annuity or yearly rent-charge, or sum of 12*l.* to his wife, with the like remedy in case of non-payment thereof) until the youngest of his said children should have attained his or her age of twenty-one years; and upon his or her attaining that age, then he gave and devised all and singular his freehold messuages, lands, tenements, tithes, hereditaments, and premises, equally unto, between, and amongst all and every his said children then living, their respective heirs and assigns for ever, to take as tenants in common; and he gave and bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow, and, from and after her death or marriage, he gave bequeathed the same unto, between, and amongst his daughters, to be divided amongst them at the discretion of his trustees. He gave and bequeathed his horses, cows, sheep, and stock of cattle, and all the rest and residue of his personal estate and effects, unto his wife *Hannah Dowson;* and he appointed his wife executrix of his will.

The question was, whether, upon the construction of this will, the testator's widow was entitled both to the benefits given to her by the will and to her dower.

Mr.

1837.

DOWSON v. BELL.

Mr. *Pemberton* and Mr. *Smyth*, for the widow, contended that there was nothing in the language of this will to bring the case within the principle upon which *Villa Real* v. *Lord Galway* (*a*), *Miall* v. *Brain* (*b*), *Roadley* v. *Dixon* (*c*), and cases of that class had been decided, where the particular dispositions of the will were held to be inconsistent with the claim to dower. The will in this case was very similar to that in the case of *Pitts* v. *Snowden* (*d*), where Lord *Hardwicke* held that the widow was entitled both to her dower and to the annuity. As to the gift of the use of the furniture, no inference could be drawn from that circumstance; nor was there any thing in the expression "all his lands" inconsistent with the widow's claim to dower, for the devise of all his lands to the trustees must be understood to be a devise of his whole real estate, subject to the legal incident which gave the widow a title to one-third. The case fell within the class of decisions which had established the wife's right to dower, unless an intention to exclude her from it could be clearly collected from the will. *Pearson* v. *Pearson* (*e*), *Foster* v. *Cook*. (*g*)

Mr. *Purvis contrà*, contended, that the gift of "all" the testator's estates, for the purposes of his will, was inconsistent with the abstraction of one third of those estates for dower in addition to the benefits given by the will to the widow, and that the remedy by distress for enforcing payment of the annuity applied to all the testator's lands, and was consequently inconsistent with an intention to devise only two-thirds of them. It must be

(*a*) *Ambl.* 682.; and more fully in 1 *Bro. C. C.* 292. n.
(*b*) 4 *Mad.* 119.
(*c*) 3 *Russ.* 192.
(*d*) 1 *Bro. C. C.* 292. n.
(*e*) 1 *Bro. C. C.* 292.
(*g*) 3 *Bro. C. C.* 347.

1837.

DOWSON v. BELL.

be admitted, however, that those considerations had not prevailed in some of the cases to which they were equally applicable.

The MASTER *of the* ROLLS.

That the testator had himself no intention to leave to his wife her claim to dower, when he made this will, cannot be reasonably doubted, but the question is whether the devise is of such a nature as to be inconsistent with the enjoyment of dower by the widow. In the consideration of this question, when a testator speaks of all his estates, he must be held to mean all his estates subject to the legal rights against them, and among these is the wife's right to dower. In this case the testator gives all his freehold messuages, lands, and tenements upon the same trusts as he had declared respecting his copyhold estates, subject to the payment of the annuity to his wife, and I cannot say that this devise is clearly inconsistent with the enjoyment of dower by the wife. She must, therefore, be declared to be entitled both to the annuity and other benefits given by the will, and to her dower.

1837.

HARRISON *v.* HARRISON.

Aug. 4, 5.

THE will of *William Harrison*, so far as it is material, was in the following words: I give and devise to my brother *John Harrison*, and *Thomas Bainton*, and their heirs, all those my farms, lands, estates, and hereditaments, situate in the parishes of *Thornton* and *Pickering*, and my lands, estates, and hereditaments, situate at *North Trodingham*, and all other my real estate whatsoever and wheresoever, upon trust to receive the rents and profits of the same respective estates, and to pay thereout yearly to my wife *Ann* during her life, in case she continue my widow, but not otherwise, the sum of 200*l.* by equal half yearly payments, the first payment to commence and be made at the end of six months next after my decease; and also out of the same rents and profits well and sufficiently to maintain and educate my son *John Bainton Harrison* during his minority, and place the surplus of the same rents and profits out at interest on mortgage, or on government security, to accumulate until my son shall attain the age of twenty-one years, and on my son attaining that age, upon trust to pay to him all the money which shall then have accumulated by virtue of the trust aforesaid, or make over and deliver to him the securities for the same after deducting all proper expenses incurred in the trust; and when my son *John Bainton Harrison* shall attain the age of twenty-one years, he shall be let into the possession or receipts of the rents and profits of all my said

A testator gave all his farms, lands, estates, and hereditaments, and all other his real estate, upon trust, to receive the rents and profits, and pay to his wife during her life, in case she should continue his widow, the sum of 200*l.*; and out of the same rents and profits, to maintain and educate his son during his minority, and to place the surplus of the same rents and profits out at interest till his son should attain twenty-one, and when his son should attain twenty-one to pay him the accumulations, and let him into possession of all his said real estates, lands, and hereditaments, subject to the annuity to the widow:

Held, that the testator's widow was entitled both to the annuity and to her dower out of the devised estates.

1837.

HARRISON v. HARRISON.

said real estates, lands, and hereditaments, with their respective appurtenances, to hold and enjoy the same according to the different natures and tenures thereof respectively, unto him, his heirs and assigns for ever, subject nevertheless to the said annuity to his mother during her widowhood.

After the date of the will, *John Harrison*, the testator's brother, died intestate as to his real estate, which descended upon the testator.

The testator died on the 10th of *November* 1829, without having republished his will, leaving *Ann Harrison*, his widow, surviving him; and the question was whether *Ann Harrison* the widow was bound to elect between the annuity given by the will, and her dower out of the devised estates.

Mr. *Macpherson*, for the widow, submitted that the gift of an annuity to the widow out of all the testator's real estates raised no implication of an intention, on the part of the testator, to exclude her from dower, and that she was consequently as fully entitled to dower out of the devised as out of the descended estates, and he cited *Foster* v. *Cook*. (*a*)

Mr. *Loftus Lowndes*, *contrà*, contended that the testator's direction to accumulate the *surplus* of the rents and profits, until his son should attain the age of twenty-one, shewed that the testator meant to give his whole estates to his trustees discharged from dower, and that the word *surplus* had been held to have that effect in the case of *Jones* v. *Collier*. (*b*) Sir *Thomas Sewell* there said the testator "expresses himself with respect to the rents

(*a*) 3 *Bro. C. C.* 347. (*b*) *Ambl.* 730.

rents and profits, so as to exclude all idea of dower. He directs the *surplus* rents and profits, subject as aforesaid, to be applied. This differs from the expression of *his estate*, which might admit of claim of dower."

1837.

HARRISON *v.* HARRISON.

The MASTER *of the* ROLLS.

Aug. 5.

The principle applicable to cases of this kind is that, where a testator makes a provision for his widow out of his real estates, she will not be excluded from dower, unless the enjoyment of dower, together with the provision made by the will, appears to be inconsistent with the intention of the testator, as it is to be collected from the language of the will. The application of this principle has frequently occasioned considerable difficulty, and the cases are somewhat conflicting. A mere rent-charge to a wife has been held not to be a bar of dower in the absence of circumstances shewing an intention to exclude her from it. In the case of *Jones* v. *Collier*, which bears very closely upon the present case, a direction by the testator to apply the surplus of the rents and profits of the devised estates to the education of his grand niece was considered by Sir *Thomas Sewell* as an indication of the testator's intention to exclude the wife from the enjoyment of dower. Sir *Thomas Sewell* thought that a gift of the surplus of the rents implied a devise of the entire estates. In the present case the will is distinguishable from that in the case of *Jones* v. *Collier*. The testator does not here begin his will by charging a particular estate with the payment of an annuity to his wife; but he devises to his trustees his farms, lands, estates, and hereditaments therein mentioned, and all other his real estate whatsoever and wheresoever, upon the trusts therein mentioned, the first of which is to pay an annuity to his wife. *Primâ*

1837.

HARRISON v. HARRISON.

facie his farms, lands, estates, and hereditaments, and all other his real estate must mean the real estate of which he had the power of disposing, which would be his real estate subject to lawful claims, and one of those lawful claims would be the dower of his wife. The surplus, therefore, of which, in a subsequent part of the will, he directs the application, would be the surplus subject to that lawful claim. Comparing the will in this case with the will in *Jones* v. *Collier*, and considering the general principles upon which the cases of *Pearson* v. *Pearson* (*a*), *Foster* v. *Cook* (*b*), and other cases of this class have been determined, I am of opinion that the provision made by this testator for his wife is not inconsistent with the intention that she should enjoy her dower, and that she is entitled, therefore, both to the annuity and to her dower out of the whole of the real estate of the testator.

(*a*) 1 *Bro. C. C.* 292. (*b*) 3 *Bro. C. C.* 347.

1836.

1836.
June 27, 28.
Nov. 7.

BETWEEN

The Right Hon. RICHARD Earl of GLENGAL, and MARGARET LAURETTA his Wife

Plaintiffs,

AND

BENJAMIN BARNARD, The Hon. EDWARD THYNNE, commonly called Lord EDWARD THYNNE, and ELIZABETH his Wife, The Hon. HENRY THYNNE, commonly called Lord HENRY THYNNE, The Hon. and Rev. JOHN THYNNE, Clerk, commonly called Lord JOHN THYNNE, WILLIAM ASTELL, MARGARET MELLISH, Widow, and WILLIAM TOOKE

Defendants.

(By supplemental Bill.)

BETWEEN

The same Plaintiffs,

AND

Lady MARGARET BUTLER, infant Daughter of the Plaintiffs - - Defendant.

THE bill was filed by the Earl and Countess of *Glengal*, against the above named Defendants, to have the trusts of the will of the testator *William Mellish*, carried into

A. having invested in stock a sum of money, in pursuance of a settlement, by way of portion for one of his daughters, and having given a bond for the payment of a further sum at his decease, entered into an agreement with *B.* to make a provision for his unmarried daughter, on her marriage with *B.* on a basis of equality with the provision made for his married daughter. A memorandum of the terms of the agreement (in which some variations were afterwards made by the parties) was written at the direction of *A.*, by *A.*'s solicitor, in the presence and with the approbation of *B.*; and *A.* gave instructions to his solicitor to prepare a settlement in conformity with the memorandum, subject to the variations, but he died before such

1836.

The Earl of GLENGAL v. BARNARD.

such settlement was executed, having made a will, by which he gave a share of the residue of his estate to his married daughter.

B. married the daughter of the testator, and performed his part of the agreement comprised in the memorandum; and on a bill filed by him and his wife claiming the portion agreed to be settled against the testator's estate, it was held, first, that the memorandum was not a binding agreement within the statute of frauds; secondly, that the share of the residue, given by the will to the daughter married in the testator's life-time, was a satisfaction of that part of her portion which was secured by bond.

into execution under the direction of the Court; and it prayed, in addition to the usual accounts, a declaration that, under the circumstances in the bill mentioned, the sum of 100,000*l.* 3 per cent. reduced Bank Annuities, which, it was alleged, was agreed by the testator in his life-time to be secured by his bond and to be settled on the Countess and her children, now constituted a debt against his estate, and that the same ought to be paid accordingly; and that the same might be raised out of the testator's personal estate, and might be settled and assured as the Court might direct, for the separate use of the Countess, and for the benefit of herself and her children, upon the same or for the like trusts as were stipulated for, and agreed upon, between the Earl and the testator, in contemplation of the marriage between the Plaintiffs. But in case the Court should be of opinion that the Plaintiffs were not entitled to have the said sum of 100,000*l.* 3 per cent. reduced annuities so raised and paid, then the bill prayed a declaration that the provision, made by the testator in his will for his daughter Lady *Edward Thynne* and her children, was a satisfaction for the bond in the bill mentioned to be dated the 8th of *July* 1830.

It appeared by the bill that, in the year 1830, the testator, *William Mellish*, had two daughters, *Elizabeth* and *Margaret Lauretta*; and that a treaty of marriage having, with his consent, been entered into between *Elizabeth* and Lord *Edward Thynne*, a son of the Marquis of *Bath*, it was agreed between these parties and their fathers, that the Marquis of *Bath*, on his part, should provide 10,000*l.* to be made the subject of a settlement, and that Mr. *Mellish* should immediately transfer to trustees for settlement, 33,333*l.* 6*s.* 8*d.* 3 per cent. consolidated Bank Annuities, and should, during his life, pay to the trustees an annual sum of 2000*l.*, and covenant

nant for the transfer by his executors upon his decease (if *Elizabeth*, or any child of the marriage, should then be living), to the trustees for settlement, of a further sum of 66,666*l.* 13*s.* 4*d.* 3 per cent. consolidated Bank Annuities.

In conformity with this agreement, the Marquis of *Bath*, by a mortgage of certain estates in *Ireland*, secured the sum of 10,000*l.* to the Defendants, Lord *Henry Thynne*, Lord *John Thynne*, *William Astell*, and *Benjamin Barnard*, the intended trustees of the settlement; and Mr. *Mellish* transferred to the same persons the 33,333*l.* 6*s.* 8*d.* 3 per cent. consolidated Bank Annuities, and executed to them a bond, dated the 8th of *July* 1830, to secure the payment by himself of the 2000*l.* a year during his life, and the transfer by his heirs or executors of the 66,666*l.* 13*s.* 4*d.* 3 per cent. consolidated Bank Annuities, upon his decease, in case his daughter *Elizabeth*, or any child of the marriage, should be then living.

By an indenture of settlement, dated the 8th of *July* 1830, and made between the Marquis of *Bath*, of the first part, Lord *Edward Thynne* of the second part, *William Mellish*, and his daughter *Elizabeth*, of the third part, and the four persons named as trustees, of the fourth part, it was declared, that the trustees should stand possessed of the 10,000*l.*, and of the 33,333*l.* 6*s.* 8*d.* 3 per cent. consolidated Bank Annuities, on trust to pay the interest and dividends to the intended wife, for her life; and after the death of the survivor of the intended husband and wife, in trust for all, or one or more of the children of the marriage, as the husband and wife should, during their joint lives, by deed appoint; and in default of such appointment, as the survivor of them should by deed or will appoint; and in default of any appointment, in trust for all the children, who being sons,

1836.

The Earl of GLENGAL v. BARNARD.

sons, should attain the age of twenty-one, or who, being daughters, should attain that age, or marry with the consent of their parents or guardians. And it was further declared that the trustees were to stand possessed of the annuity of 2000*l.* a year, and of the 66,666*l.* 13*s.* 4*d.* 3 per cent. consolidated Bank Annuities, secured by Mr. *Mellish*'s bond, in trust (during the joint lives of Lord *Edward Thynne* and *Elizabeth*) to pay the annuity and the dividends of the stock to the separate use of *Elizabeth*, free from the debts and control of her husband, and without power of anticipation; and after the death of Lord *Edward Thynne*, if he should die in the lifetime of *Elizabeth*, to *Elizabeth* for her life, and after her death (whether Lord *Edward Thynne* should be then living or not), the annuity and dividends of the stock were to be held in trust for the children of the marriage, as the parents might jointly appoint; and in default of a joint appointment for all the children who, being sons, should attain twenty-one, or being daughters, should attain that age, or marry, with such consent as aforesaid, equally. And it was provided that, if there should be no children of the marriage, or none who should acquire vested interests, then the 10,000*l.* should, after the decease of the survivor of Lord *Edward Thynne* and *Elizabeth*, remain in trust for Lord *Edward Thynne*, his executors and administrators, for his and their absolute use and benefit; and the 33,333*l.* 6*s.* 8*d.* 3 per cent. consolidated Bank Annuities, and the annuity of 2000*l.*, and the 66,666*l.* 13*s.* 4*d.* 3 per cent. Bank Annuities should, whether Lord *Edward Thynne* should or should not be then living, remain in trust for Mr. *Mellish*, his executors, administrators, and assigns, for his and their absolute use and benefit.

The marriage took effect on the same 8th day of *July* 1830.

William

1836.

The Earl of GLENGAL v. BARNARD.

William Mellish made his will, dated the 2d of *November* 1833, as follows: —

"I give and devise all my real estate, whatsoever and wheresoever, unto *William Astell* and *Benjamin Barnard*, their heirs and assigns for ever, upon the following trusts: — As to my freehold and copyhold estates at *Woodford* and elsewhere in the county of *Essex*, my freehold estate in the parish of *St. George* in the *East*, *Middlesex*, my freehold house in *Church Row*, *Hampstead*, and my land at *Ramsay*, *Huntingdonshire*, in trust to pay the rents and profits thereof to my daughter Lady *Edward Thynne*, for her own sole and separate use, during her life, free from the control, debts, or engagements of her present or any future husband, and so as that she shall not be able to anticipate any portion thereof; remainder to the first and other sons of my said daughter in tail in strict settlement; remainder to her daughters as tenants in common in tail, with cross remainders amongst them in tail; remainder to my daughter *Margaret Lauretta Mellish* for her life, for her own sole and separate use, in the same manner as her sister; remainder to her first and other sons in tail male in strict settlement; remainder to her daughters as tenants in common in tail, with cross remainders amongst them in tail; remainder to my own right heirs. And as to all my real estate in the parish of *All Saints*, *Poplar*, including the Isle of *Dogs*, upon the same trusts for the benefit of my daughter *Margaret Lauretta Mellish* and her children; and with remainder over, in case of failure of issue, to *Lady Edward Thynne* and her children, as I have declared with respect to the property given to *Lady Edward Thynne*, in the same manner as if such trusts, *mutatis mutandis*, were here repeated. I give my leasehold house in *Richmond Terrace*, *Whitehall*, to my said trustees, upon the same trusts

1836.

The Earl of GLENGAL *v.* BARNARD.

trusts for the benefit of my daughter *Lady Edward Thynne* and her children, as I have declared with respect to the real estate given to her, or as near thereto as the nature of the property will admit. I give my shares in the *East* and *West India Docks*, in the *Wey* and *Arun Canal*, and the *Poplar* and *Greenwich Ferry*, to my trustees, for the benefit of my daughter *Margaret Lauretta Mellish* and her children, in the same manner. I give all my household furniture, books, plate, linen, &c., to my wife *Margaret Mellish*. I also give to my said wife an annuity of 2000*l.* during her life, to be charged upon and payable out of my funded and other property, and to be accepted by her in lieu of all dower. I give all the residue of my personal estate whatsoever and wheresoever, unto my said trustees in trust, to sell my ships and cargoes, and such other parts thereof as they may think advisable, and to invest the money arising therefrom on government or real securities; and after providing for the payment of the annuity to my wife, and paying such legacies, as I may hereafter give by any codicil or writing, as to one moiety thereof in trust to pay the interest thereof to my daughter *Lady Edward Thynne*, for her sole and separate use for her life, in the same manner as I have directed with respect to the rents of the real estate given to her; remainder to the children of my said daughter, in such shares as she shall by deed or will appoint, and in default of such appointment, to such children equally, sons to take vested interests at twenty-one, and daughters at that age or marriage; and in default of such issue, upon the same trusts for my daughter *Margaret Lauretta Mellish* and her children, with a like power of appointment; and if both shall die without issue, then in trust for my next of kin. And as to the other moiety, upon the same trusts for my daughter *Margaret Lauretta Mellish* and her children, with a like power of appointment; and failing

failing issue, to her sister and her children, and with ultimate remainder to my next of kin, as declared with respect to the first moiety. And I desire that there may be inserted in my will the usual powers with respect to maintenance and advancement of my daughter's children during their minorities. And after giving certain powers to his trustees,the testator appointed his trustees, and also *William Pitts Dimsdale*, *John Dimsdale*, and *John Barnard*, executors of his will."

The bill stated that, shortly after the date of the will, the Plaintiff, the Earl of *Glengal*, made proposals of marriage to the testator's daughter *Margaret Lauretta*, and that the testator communicated to his solicitor, Mr. *Tooke*, that he had been applied to for his consent, and that, in the event of his accepting such proposals, it was his intention to settle on his daughter *Margaret Lauretta* a similar income of 3000*l.* per annum to that which he had settled on his daughter *Elizabeth*, with no other difference than that of securing altogether the whole of that income to the separate use of his daughter *Margaret Lauretta*, and that he should expect Lord *Glengal*, on his part, to settle 20,000*l.* for the younger children, and 1200*l.* jointure on Lady *Glengal*, it having been ascertained that Lord *Glengal* was empowered to make a settlement to that extent.

The bill stated that the testator, being satisfied with the result of the inquiries which were made by his solicitor as to the state of Lord *Glengal*'s *Irish* property, and the incumbrances upon it, was induced to entertain Lord *Glengal*'s proposals and to discuss the terms of a settlement; and that several meetings took place between Lord *Glengal*, the testator, and Mr. *Tooke*, at all of which the testator expressed his intention to place his two daughters upon an equal footing, and that at the

1836.

The Earl of GLENGAL v. BARNARD.

the last of such meetings, which took place on the 7th of *January* 1834, it was finally settled and agreed between the testator and the Plaintiff, Lord *Glengal*, that, if such marriage should take place, the testator would give his bond to the trustees of the intended settlement for the payment of an annuity of 3000*l.* during his life, and for the transfer of 100,000*l.* 3 per cent. reduced Bank Annuities to such trustees immediately after his decease, and that such annuity and the dividends of the stock after his decease should be paid to Lady *Glengal* for her life for her separate use, and that if she should die without children, the capital of such stock should revert to the testator, and that, if there should be children of the marriage, the capital should go to the younger children in such manner as the Plaintiffs should appoint, and in default of appointment, among such younger children equally, and if only one child, then to such child; and that the Plaintiff, Lord *Glengal*, should exercise the power which he had of charging his estates with a jointure of 1200*l.* per annum in favour of Lady *Glengal*, and 20,000*l.* in favour of the younger children, subject to a like power of appointment among such children.

The bill proceeded to state that, as soon as the terms of the settlement had been agreed upon, Mr. *Tooke*, at the desire of the testator, drew up a memorandum of the substance and effect of the arrangement, which was in the following words: —

"Mr. *Mellish* to transfer 100,000*l.* consols into the names of trustees, upon trust to pay the dividends to Miss *Mellish* for her life to her separate use; on her death without children to revert to her father's estate. Should there be children, to go to the younger children as the parents may jointly appoint; if no such appointment, then to go among such younger children share and

and share alike; if only one child, to such only child. Lord *Glengal* to exercise the power contained in the settlement by covenanting to charge his estate with a jointure of 1200*l.* per annum in favour of his lady, and 20,000*l.* in favour of the younger children, subject to a like power of appointment among them.

The bill stated that Mr. *Tooke* read the memorandum over to the testator, and the Plaintiff, Lord *Glengal*, and that they both approved of the same; but that it was afterwards arranged that the proposed sum of stock should be secured by bond instead of being actually transferred to trustees, and that the provision should be, not for the younger children only, but for all the children of the marriage, in conformity with the settlement made on the marriage of Lady *Edward Thynne*, which the testator desired to be the basis of the intended settlement. That, subsequently to the preparation of the minute of the terms of settlement, the Plaintiff, Lord *Glengal*, voluntarily proposed to make a further provision of 6000*l.* a year by way of jointure for Lady *Glengal*, in case there should be no issue of the marriage, but that it was afterwards agreed between the Plaintiff, Lord *Glengal*, and the testator, that such increased jointure should not exceed the sum of 2000*l.* a year.

The bill stated that on the 13th of *January* the testator declared to Mr. *Tooke* that he had finally accepted the Earl's proposals of marriage, and instructed Mr. *Tooke* to prepare the deeds of settlement upon the terms which had been agreed to, and stated his wish that the marriage should take place on the 30th of the same month of *January*.

The bill stated that the drafts of the deeds were accordingly prepared, and sent on the 18th of *January*

1836.

The Earl of GLENGAL v. BARNARD.

to a conveyancer to be settled, and were settled accordingly; and that the testator was perfectly satisfied with the same, but desired the drafts to be laid before his friend Mr. *Tidd* for his perusal. That the drafts were sent on the 24th of *January* to Mr. *Tidd*, who approved of them, and that the same were about to be engrossed and made ready for execution, but that the testator died on the 27th day of the same month of *January*.

The bill then stated that *Benjamin Barnard* alone proved the will of the testator, the other executors named therein having renounced probate; that the marriage agreed upon between the Plaintiffs in the lifetime of the testator was duly solemnised on the 19th of *February* 1834; and that previously to and in contemplation thereof, one of the draft settlements which had been prepared in the lifetime of the testator, for the purpose of charging the Plaintiff Lord *Glengal's Irish* estates with the sum of 1200*l.* by way of jointure for Lady *Glengal*, and a further jointure of 2000*l.* a year in case the Plaintiff, Lord *Glengal*, died without issue, and with the further sum of 20,000*l.* for the younger childrens' portions, was executed by the Plaintiff, Lord *Glengal*, on the day of the marriage, in pursuance of the agreement which the Plaintiff had entered into with the testator. That by another indenture of the same date, and made between the Plaintiff, Lady *Glengal*, by her then name of *Margaret Lauretta Mellish*, of the first part, the Plaintiff, Lord *Glengal*, of the second part, and *William Tooke* of the third part, after reciting the will of *William Mellish*, and the intended marriage between the Plaintiffs, it was witnessed that the Plaintiff, Lady *Glengal*, with the privity and consent of Lord *Glengal*, assigned to *William Tooke*, his executors &c., all the share and interest to which she should become entitled, during the joint lives of herself and the Plaintiff Lord *Glengal*, in

1836.

The Earl of GLENGAL v. BARNARD.

in the rents and profits of the real estate, and in the personal estate devised and bequeathed respectively by the will of *William Mellish*, and in all monies by the said will directed to be paid to her for her life, and all her right, title, and interest therein upon trust, after the marriage, during the joint lives of the Plaintiffs, for the Plaintiff Lady *Glengal* for her separate use, and so that she should have no power to aliene or anticipate the same. And the Plaintiff Lord *Glengal* thereby covenanted that, in case he should at any time thereafter become entitled to any share of the personal estate bequeathed by *William Mellish* as next of kin of any child or children of the marriage, who should die under the age of twenty-one, or in right of Lady *Glengal*, he would assign such share to the trustees of the settlement, to be by them held upon such trusts and for such purposes as Lady *Glengal* should by deed or will appoint, and, in default of appointment, in trust for Lady *Glengal* her executors, administrators, and assigns.

The bill then insisted that the agreement or undertaking on the part of the testator to settle the 100,000*l.* 3 per cent. reduced annuities upon the Plaintiff Lady *Glengal*, and the issue of the marriage, was a good and valid undertaking, more especially as the Plaintiff Lord *Glengal* had, on the faith of such undertaking, executed his part of the agreement, and that such sum of 100,000*l.* 3 per cent. reduced bank annuities was a debt due and owing from the testator at the time of his death, and ought to be paid to trustees out of his personal estate, and settled and secured for the separate use of Lady *Glengal*, and for the benefit of her children upon the same trusts and purposes as were stipulated for and agreed to between the testator and the Plaintiff Lord *Glengal*.

1836.

The Earl of GLENGAL v. BARNARD.

A child of the marriage was born after the institution of the suit, and made a Defendant by a supplemental bill. There was no issue of the marriage between Lord and Lady *Edward Thynne*. The facts stated in the bill were proved by the evidence of Mr. *Tooke*, and were not disputed.

The questions in the cause were, first, whether the transaction between Lord *Glengal* and the testator constituted a binding agreement which could be enforced against the personal estate of the testator; and secondly, whether, supposing it not to constitute such an agreement, the benefits given to Lady *Edward Thynne* by the will were a satisfaction for that part of Lady *Edward Thynne*'s portion, the payment of which, on the death of the testator, was secured by the testator's bond.

Mr. *Pemberton* and Mr. *Reynolds*, for the Plaintiffs.

The first question is, whether the engagement into which Mr. *Mellish* entered in his lifetime to make a provision for his daughter on her marriage is, with reference to the statute of frauds, a binding agreement. It cannot be denied that, by the provisions of the statute, an agreement made in consideration of marriage must be in writing. How far a subsequent part performance may give effect in equity to an agreement made upon marriage as well as to any other agreement, it will be unnecessary to consider, if it can be shewn that the signature of Mr. *Mellish*'s name in the memorandum drawn up by Mr. *Tooke* by the direction of Mr. *Mellish*, was in point of legal effect the signature of Mr. *Mellish*. It has been decided, that it is not necessary that the signature should be at the foot of an agreement; and the name of Mr. *Mellish*, introduced as it is in this memorandum, is a sufficient signature within the statute of frauds to bind him,

him, if it had been written by himself; *Western* v. *Russell* (*a*), *Ogilvie* v. *Foljambe* (*b*), *Propert* v. *Parker*. (*c*) The principle, upon which this point has been determined, is that, if the name be so inserted as to have the effect of giving authenticity to the instrument, it is immaterial in what part of the instrument it is found: that principle was recognised by Mr. Baron *Eyre* in *Stokes* v. *Moore* (*d*), though in the particular case he was of opinion that there was not a sufficient signature within the statute. But Mr. *Tooke* was the agent of both parties, and this transaction falls precisely within the principle upon which it has been decided, that an auctioneer is the agent of both vendor and purchaser, and that a memorandum of the bidding made by him is a sufficient signature within the statute of frauds, and constitutes a binding contract between both parties: *Emmerson* v. *Heelis* (*e*), *White* v. *Proctor* (*g*), *Kemeys* v. *Proctor* (*h*), *Bird* v. *Boulter*. (*i*) The authority to Mr. *Tooke* to act as the agent of Mr. *Mellish* was distinctly given, and it is not necessary that such authority should be in writing; *Coles* v. *Trecothick*. (*k*) If the agreement be binding, it cannot be affected by the subsequent variations made in it, for these variations neither increase nor diminish Mr. *Mellish*'s liability, and cannot possibly have the effect of relieving him from his obligation.

Supposing the Court, however, to be of opinion that this was not a valid agreement within the statute of frauds, there is another mode by which the equality between the two daughters, which was unquestionably intended by Mr. *Mellish*, may be worked out; for the benefits

(*a*) 3 *V. & B.* 187.
(*b*) 3 *Mer.* 53.
(*c*) 1 *Russ. & Mylne*, 625.
(*d*) 1 *Cox*, 219.
(*e*) 2 *Taunt.* 38.
(*g*) 4 *Taunt.* 209.
(*h*) 1 *J. & W.* 350.
(*i*) 4 *B. & Ad.* 443.
(*k*) 9 *Ves.* 250.

1836.

The Earl of GLENGAL v. BARNARD.

benefits given to Lady *Edward Thynne* by the will must be taken, it is submitted, as a satisfaction for that part of the portion which Mr. *Mellish* entered into an obligation to pay by the bond of the 8th of *July* 1830. There is a distinction between the satisfaction of an ordinary debt by a legacy, and the satisfaction, by a legacy, of that species of debt which is constituted by a covenant or engagement, on the part of a parent, to give a portion to a child. The Court presumes satisfaction in both cases; but it lays hold of slight circumstances to rebut the presumption in the case of the debt, whereas it leans strongly against the double provision in the case of the portion, *Hanbury* v. *Hanbury* (*a*), *Hinchcliffe* v. *Hinchcliffe* (*b*), and infers that the legacy is meant to be a satisfaction for the portion, unless a contrary intention is to be collected from the context of the will, or from extrinsic evidence, which is here admissible, as well to rebut the presumption against a double provision, as to fortify that presumption, where it is attempted to be rebutted: *Hartopp* v. *Hartopp* (*c*), *Weall* v *Rice.* (*d*) A satisfaction of a portion by will must be of the same nature, and equally certain with the portion; but it is not necessary that the amount should be the same, provided the provision by the will is not less than the portion; nor is it material, whether the satisfaction is by way of legacy or of residuary bequest; *Richman* v. *Morgan* (*e*), *Bengough* v. *Walker.* (*g*) The difference between the limitations of the stock secured by the settlement, and the limitations of the share of the residue given by the will are in this case inconsiderable, and at any rate are not sufficient to rebut the presumption that the testator did

(*a*) 2 *Bro. C. C.* 352.
(*b*) 3 *Ves.* 516.
(*c*) 17 *Ves.* 184.
(*d*) 2 *Russ. & Mylne*, 251.
(*e*) 1 *Bro. C. C.* 63.; and 2 *Bro. C. C.* 394.
(*g*) 15 *Ves.* 507.

did not intend a double provision, or rather to defeat the intention of Mr. *Mellish*, for extrinsic evidence of that intention is admissible, to put both his daughters upon an equality. In *Weall* v. *Rice*, where this subject was very fully discussed, the Court decided against the double provision, though the variations between the limitations in the settlement and will were very considerable. The late case of *Wharton* v. *Lord Durham* (*a*), in which both the Vice-Chancellor and Lord *Brougham* decided in favour of the double provision, turned very much upon specialties in the language of the settlement and will.

Mr. *Spence*, and Mr. *Griffith Richards*, for Lord *Edward Thynne*.

It is plain that Mr. *Mellish* did not intend equality between his two daughters, for he made no provision in his will for such an equality. The bill does not pray for the specific execution of the supposed agreement for this obvious reason, that the terms of the memorandum were essentially varied. No bond is mentioned in the memorandum; but it was afterwards arranged that a bond should be substituted for a transfer of stock. The amount of the jointure was varied, and the provision for the children was also materially altered in the course of the subsequent discussions. The alleged agreement was in fact nothing but a mere parol treaty for an agreement between the parties, the heads of which were committed to writing by a third party. Nothing was in fact concluded between the parties; and both parties considered themselves at liberty to alter, and did materially alter, the terms originally proposed. As to the part

(*a*) 5 *Sim.* 297.; and 3 *Mylne & Keen*, 472., but reversed, upon appeal, by the House of Lords. 5 *Clark & Finn.* 146.

1836.

The Earl of GLENGAL v. BARNARD.

part performance of the alleged agreement, it has been decided that a parol agreement for a settlement upon marriage cannot be sued on upon the ground of part performance, unless in the case of fraud, where equity, it is said, should relieve even against the statute; *Montacute* v. *Maxwell* (*a*), *Dundas* v. *Dutens.* (*b*) The part performance took place after the death of one of the parties to the alleged agreement, and as Mr. *Mellish* bequeathed a large sum to his daughter, it can scarcely be said that Lord *Glengal* married her solely on the faith of the agreement.

It is settled that a gift of a residue is not a satisfaction for a debt, and there is no difference in this respect between a debt and a covenant to provide for a wife or daughter; *Devese* v. *Pontet* (*c*), *Farnham* v. *Phillips.* (*d*) The principle, upon which this rule is founded, is that, a residue being in its nature uncertain, it is impossible to infer from a general gift of a residue, an intention to adeem a particular gift.

Mr. *Kindersley* and Mr. *Reynolds*, for Lady *Edward Thynne* and the trustees of her settlement.

The treaty for a settlement between Mr. *Mellish* and Lord *Glengal* never amounted to a concluded agreement; and if Mr. *Mellish* had in his lifetime repudiated the supposed contract, and refused his consent to the marriage, it is impossible to contend that he would have been bound by any thing that had taken place in the progress of the negociation. There is no analogy between this case, and the cases in which the auctioneer's memorandum has been held to bind both vendor and vendee. The

(*a*) 1 *P. Wms.* 618.
(*b*) 1 *Ves.* jun. 196.; *S. C.* 2 *Cox*, 235.
(*c*) 1 *Cox*, 188.
(*d*) 2 *Atk.* 215.

The decisions as to the effect of the auctioneer's signature are founded upon the necessity of the case, and the bidding is equivalent to a definite agreement on the part of the purchaser. In this transaction there was nothing definite; the alleged contract was a mere contract *in fieri*, which this Court would not have executed, if Lord *Glengal* had attempted to enforce the specific performance of it in Mr. *Mellish*'s lifetime; *Antrobus* v. *Smith* (*a*), *Cotteen* v. *Missing* (*b*), *Hooper* v. *Goodwin* (*c*), *Gaskell* v. *Gaskell*. (*d*) Even if it could be considered as an agreement, it was an agreement which Mr. *Mellish* had the power of revoking, until the marriage took place, and his death was a revocation. The difference between the limitations of the stock given by the settlement, and the limitations of the share of the residue given by the will is so great, that it is impossible, consistently with the authorities bearing upon this part of the case, to consider the residuary gift as a satisfaction for the amount of the stock secured by the bond. Mr. *Tooke*'s evidence is inadmissible for the purpose of explaining the intention of the testator.

Mr. *Pemberton*, in reply.

In the transaction between Mr. *Mellish* and Lord *Glengal*, there was in reality a less departure from the statute of frauds than in the case of an auctioneer; because the authority given to Mr. *Tooke* was express, whereas in the auctioneer's case it is only implied. It is said that this was a voluntary agreement, and therefore not one which a court of equity would carry into execution; but where is the difference between a contract in consideration of marriage, and a contract for money?

(*a*) 12 *Ves.* 39.
(*b*) 1 *Mad.* 176.
(*c*) 1 *Swans.* 485.
(*d*) 2 *Y. & J.* 502.

1836.

The Earl of GLENGAL v. BARNARD.

money? That Mr. *Mellish*, after having given his consent to the marriage, and entered into this contract, was afterwards at liberty to repudiate it, is a proposition which cannot be maintained. The variations, subsequently introduced into the contract by the consent of both parties, could not affect its substance, or justify either party in receding from it. As to the question of satisfaction, it is said that there is no difference between the principles upon which a debt and a portion is presumed to be satisfied; but the whole case turns upon that difference, for the presumption of law is that a portion is satisfied by a legacy, and that a debt is not. *Richman* v. *Morgan* is an express authority to shew that a gift of a residue may be a satisfaction for a portion. As to the variations between the limitations in the settlement and the limitations in the residuary bequest, the question is not whether these are slight or considerable, but whether they are such variations as negative the presumption of an intention to give a single portion instead of a double one. They are circumstances to be looked to only as *indicia*, by which the Court is to judge of the intention of the testator. As to the objection to Mr. *Tooke*'s evidence, it is settled that parol evidence may be admitted to shew whether a testator did, or did not intend to give a double portion. *Weall* v. *Rice*. (*a*)

Nov. 7. *The* MASTER *of the* ROLLS (after stating the facts).

Lord and Lady *Glengal* now insist that the arrangements for their marriage, and for the settlement to be made thereon, had proceeded to such a length in the lifetime of Mr. *Mellish*, as to be absolutely binding upon him personally, and upon his assets after his death; and so insisting, they claim to have 100,000*l.* 3 per cent. stock provided

(*a*) 2 *Russ. & Mylne*, 251.

provided by his executors and transferred to the trustees of the settlement, for the separate use of Lady *Glengal* for life, with remainder to the children of the marriage. In this way they say the two daughters of Mr. *Mellish* would, as their father intended, be placed upon an equality. Each would have a portion of 100,000*l.* 3 per cent. stock, and an equal share of the residue of his estate under his will. I see no reason to doubt that Mr. *Mellish* intended an equality between his daughters. The question however is not what were his intentions only, but what were his acts and obligations; and, notwithstanding the length to which the treaty had gone, the consenting disposition of all parties, and the common satisfaction which prevailed as to the proposed terms of the settlement then intended to be made, it appears to me that, up to the time when Mr. *Mellish* was seized with the illness of which he died in a few days afterwards, and at the time of his death, all the arrangements were contingent and provisional. So long as he was competent to attend to business he might, I think, if he had so pleased, have withdrawn his consent to the marriage, and refused to make any settlement.

It was argued that the situation and duties of Mr. *Tooke*, the solicitor of Mr. *Mellish* on the occasion of the marriage treaty, were analogous to the situation and duties of an auctioneer on the occasion of a sale by auction, and that the memorandum of the terms of settlement written by Mr. *Tooke*, and containing the names of the contracting parties, ought to be considered as written by him as the agent of both parties, and as binding upon them, on the same principle that the auctioneer's memorandum of sale and purchase has been deemed to be binding on the vendor and purchaser at an auction.

But

1836.

The Earl of GLENGAL v. BARNARD.

But on the best consideration which I can give to the evidence of Mr. *Tooke*, I do not think that the terms of the agreement were, or by any of the parties were considered to be, finally settled at the time when the memorandum was written; and, if the terms had been then concluded upon, and not afterwards deviated from, I think that Mr. *Tooke* cannot be considered as having acted on that occasion as the agent of both parties, lawfully authorised by them to bind them, by his signature of their names in the memorandum which he made for the purpose of stating the terms of the contract then contemplated. The nature of the proceeding by auction — the bidding for the purpose of making the purchase — the necessity of making a statement of the bidding — the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances afford intelligible ground for the decision in *Emmerson* v. *Heelis* (*a*), and the approbation which has since been bestowed upon it. Yet both Sir *William Grant* and Lord *Eldon* said that, before that decision, they should not have considered that the auctioneer was such an agent, but should have agreed with the previously expressed opinion of Lord Chief Justice *Eyre*, that he was not an agent so authorised; *Stansfield* v. *Johnson* (*b*), *Walker* v. *Constable* (*c*); and under the circumstances of this case, I think that Mr. *Tooke*, in performing the ministerial act of writing down the terms of the proposed settlement, so far as they were at that time agreed upon, had no authority to bind either party.

And the arrangement being, as I think, not binding on Mr. *Mellish* in his lifetime, Lady *Glengal* is entitled only

(*a*) 2 *Taunt.* 38.
(*b*) 1 *Esp.* 101.
(*c*) 2 *Esp.* 650.; and 1 *Bos. & Pull.* 306.

only to such provision as her father has given by his will, that is, an equal share of the residue. But in her character of residuary legatee she has an important interest in the claims upon the assets, and having regard to the obligation entered into by Mr. *Mellish* on the marriage of Lady *Edward Thynne*, and to the provisions contained in the will, it is insisted by the Plaintiff (in case they should fail upon the first point, as I think they have) that the benefits, given to Lady *Edward Thynne* by the will, are to be taken in satisfaction of the bond of the 8th of July 1830, or of that part of Lady *Edward*'s portion which was covenanted to be paid on the death of Mr. *Mellish*.

This claim is resisted on two grounds. First, it is said to be a general rule that the gift of a residue or share of a residue cannot be deemed to be given in satisfaction of a portion; and secondly, that there are such variations between the limitations of the portion by the settlement, and the limitations of the share of residue by the will, that one cannot be substituted for the other.

In support of the first ground of objection many cases were cited, but they were almost all of them cases, not of portions, but of ordinary debts and obligations, and it seems to be settled that the gift of a residue, being of uncertain amount, shall not, without more, be taken in satisfaction of a specific sum of money owing by the testator to an ordinary creditor. But portions provided and secured by husbands for their wives are subject to other considerations, and a distributive share of the husband's personal estate, payable to the widow upon an intestacy, may be taken, if not as a satisfaction of the provision secured to her, yet as a performance of the obligation to make it: *Blandy* v. *Widmore* (*a*), *Lee* v. *D'Aranda*,

(*a*) 1 *P. Wms.* 324.

1836.

The Earl of GLENGAL v. BARNARD.

D'Aranda (*a*), *Garthshore* v. *Chalie* (*b*), *Goldsmid* v. *Goldsmid.* (*c*) The principle, on which these cases were decided, is applicable to the case of portions secured to be paid by a parent for his child, and, although it is true, as Lord *Eldon* said in the case of *Garthshore* v. *Chalie*, that a legacy, *primâ facie*, imports a bounty and an intention of kindness, which is absent in the case of intestacy, yet it is settled that the legacy of a specific sum may be deemed a satisfaction or performance of a covenant to pay or leave a portion, and the question is, whether the circumstances of the gift being of an unstated or merely unliquidated amount, and incapable of being accurately ascertained till some time after the testator's death are of such importance, that, however large the gift may eventually prove to be, the Court must of necessity say that it cannot be taken in satisfaction, or by way of performance of a covenant to pay a portion. Now in *Richman* v. *Morgan* (*d*), the father by his settlement provided 8000*l.* for each of his younger children. By his will he gave a sum of 4000*l.* in the funds to his wife for life, and after her decease to his second son *John*, to whom he also gave the residue of his personal estate. It was held that the gifts by the will must go in satisfaction of the provision by the settlement. In that case there was a proviso in the settlement, that the value of any money or lands given by the father in advancement on marriage or otherwise, should be deducted from the portion, unless the father should by writing declare to the contrary, and that circumstance necessarily had considerable weight in the decision; but as to the objection that the bequest was of the

(*a*) 3 *Atk.* 419. *S. C.* 1 *Ves.* sen. 1.

(*b*) 10 *Ves.* 1.

(*c*) 1 *Swanst.* 211. *S. C.* 1 *Wils. C. C.* 140.

(*d*) 1 *Bro. C. C.* 63.; 2 *Bro. C. C.* 394.

1836.

The Earl of GLENGAL v. BARNARD.

the residue, and not capable of being paid immediately, Lord *Thurlow* thus expresses himself: (*a*) — "Had a legacy been given to the amount of 8000*l.*, but not payable till twelve months afterwards, it would still have been a satisfaction, because a specific sum. It is said the thing here to be given ought to have been a sum of money; and consequently no other thing however valuable, as a *chose in action*, or any thing to be reduced into possession, could be a satisfaction. It would be too idle to contend, that a bond not payable at the actual moment of the testator's death, or stock to the amount of 50,000*l.* or any other large sum should not be a satisfaction, because it could not be immediately transferred into the hands of the son. But supposing there was a residue of 100,000*l.* and 500*l.* cash, and the rest in various other articles outstanding, then the question would be whether, in point of fact, he had advanced the son without his taking the 8000*l.* It would be ridiculous to insist that that residue would not have been a satisfaction for the 8000*l.*: it is strange to say that the gift of the whole residue being uncertain shall not be a satisfaction, when a moiety of that very residue given as a legacy will. Shall it be said that that half shall be deemed a performance of the covenant, but a gift of the whole shall not?"

In *Bengough* v. *Walker* (*b*), there was a covenant, by articles of marriage, to pay 2000*l.* to the only son of the marriage. The father, by his will, gave to that son certain real estates, and bequeathed to him his interest in certain powder works, and so much money as, being added to the capital in the powder works at the last settlement before the testator's death, should make up in the whole 10,000*l.*, out of which the legatee was to pay

(*a*) 2 *Bro. C. C.* 396. (*b*) 15 *Ves.* 507.

1836.

The Earl of Glengal v. Barnard.

pay an annuity of 20*l.* to another person for life. Though there was in that case a pecuniary bequest to some amount, yet the amount was wholly uncertain, depending on the value of the powder concern, which, it was argued, could not be taken in satisfaction of the portion. Sir *William Grant*, however, dismissed the bill, which sought payment of the portion; and he took occasion, after citing cases, to say that it never had been decided that a residue might not, under any given circumstances, be a satisfaction of a portion. And in the present case, if a moiety of the residue of Mr. *Mellish*'s estate exceed the value of the stock which is secured to be transferred by the bond, and if there be nothing so far inconsistent between the limitations of the stock secured by the bond, and the limitations of the share of residue given by the will, as to rebut the presumption against double provisions, I am of opinion that *Lady Edward Thynne* is not entitled both to the stock and to the share of residue.

It has not been disputed at the bar that the share of residue exceeds the value of the stock secured by the bond; but as to this, the Court cannot act on the admission of a married woman, and there must be an inquiry.

As to the limitations, and upon the question whether the two gifts confer such conflicting interests as are sufficient to rebut the presumption against double provisions, we must look to the settlement and to the will.

By the settlement, 66,666*l.* 13*s.* 4*d.*, 3 per cent. consolidated bank annuities, are to be transferred to trustees, on trust, during the joint lives of the husband and wife, to pay dividends to the wife for her life for her separate use, free from her husband's debts or control,

control, and without power of anticipation; and, if she survives her husband, to her for life.

By the will, half the residue is given to trustees to be invested on trust to pay the dividends to her for life for her separate use, free from the control, debts, or engagements of her present or any future husband, and so that she shall not be able to anticipate any portion thereof.

By the settlement, after her death, whether the husband be living or not, the stock is given in trust for the children of the marriage, as the parents shall jointly appoint; and, in default of joint appointment, to all the children who, being sons, shall attain twenty-one, or, being daughters, shall attain that age, or marry with consent.

By the will, the residue is given after her decease to her children in such shares as she shall by deed or will appoint, and in default of such appointment, to such children equally; sons to take vested interests at twenty-one, and daughters at that age or marriage.

The difference between the different limitations for the benefit of *Lady Edward Thynne* appears to me to be immaterial. The difference between the different limitations for the benefit of her children are more important. The sum settled is limited for the benefit of the children of the marriage, and subject only to the joint appointment of their parents. The share of residue bequeathed is limited for the benefit of all the children of the daughter, and subject to her appointment only.

But the principle on which the Court proceeds in cases of this nature is, I apprehend, correctly stated by

1836.

The Earl of Glengal v. Barnard.

Sir *John Leach* in *Weall* v. *Rice* (*a*), — that, if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by intrinsic evidence, derived from the nature of the two provisions, or by extrinsic evidence.

The question here is, whether the two provisions are of a nature so different as to afford any evidence in favour of a double provision; and on the whole it appears to me that they are not.

Declare that *Lady Edward Thynne* and her children are not entitled to the benefit both of the bond dated the 8th of *July* 1830, and of the residuary bequest contained in the will of the testator *William Mellish*. Decree the usual accounts of the testator's estate, and direct the Master to ascertain the clear value of the residue: inquire whether there are any, and what children of the marriage of Lord and Lady *Edward Thynne*; and reserve further directions and costs.

(*a*) 2 *Russ. & Mylne*, 267.

1837.

DOUNGSWORTH *v.* BLAIR.

1837.
June 28.
Aug. 9.

F. B. by indentures of lease and release, in consideration of natural love and affection for his sisters, and a nominal consideration, released a particular freehold estate to *B.*, his heirs and assigns; and he assigned a particular leasehold estate, and all other the property in *Great Britain* or *Ireland*, whether real or personal, which he might be entitled to at the time of executing the indenture to *B.*, his executors, administrators, and assigns, upon trust that *B.*, his heirs, executors, administrators, and assigns, should stand possessed thereof upon trust to pay the rent, interest, dividends, or annual produce arising therefrom, or the monies arising from the sale thereof, equally between his three sisters. *F. B.* was, at the date of this indenture and of his death, seised of a share in a freehold house situate in *King Street*, not mentioned in the lease or release:

Held, that the release could not operate as a covenant to stand seised of the house in *King Street*, there being in the release no mention of that house, and the general words being, from the frame of the deed, applicable only to leasehold or other personal estate.

Whether an instrument, defective as a release or other assurance, can operate in equity as a covenant to stand seised, where the covenantee is a stranger in respect of blood or marriage to the covenantor, but connected by blood or marriage with the person for whose use the covenant to stand seised is made, *quære*.

IN the month of *December* 1815, Major *Francis L. Burman*, his brother *Edmund Burman*, and his three sisters were seised in fee as tenants in common of a house in *King Street*, *Westminster*. The house was in that month sold to *Richard Harrison*, and a conveyance was executed by all parties entitled to the premises, except Major *Burman* who was abroad, but who, as it was alleged, concurred in the sale. His share of the purchase-money was invested in the name of trustees, but there was no evidence that he ever concurred in the contract. By indentures of lease and release, dated respectively the 21st and 22d of *October* 1827, the release being made between *Francis L. Burman* of the one part, and *Robert Blair* of the other part, after reciting that *Francis L. Burman* was entitled, among other things, to an undivided share of certain stables in *Cleveland Mews*, near *King Street*, in the parish of *St. James*'s, in the City of *Westminster*, and also to one undivided fifth part of an unexpired term of years in a house, No. 1. *Lower Grosvenor Place*, in the county of *Middlesex*, and that he, *F. L. Burman* had proposed to assign over all his interest

1837.

DOUNGSWORTH v. BLAIR.

interest in the aforesaid premises, and in such other property situate in *Great Britain* and *Ireland* or any part thereof, whether real or personal, as he might at the time of the execution of the said indenture be entitled to, for the benefit of his sisters *Catherine* the wife of the said *Robert Blair*, *Sarah* the wife of *John Farmer*, and *Eliza* the wife of *James Farmer*, and had proposed to assign all such his right and interest as aforesaid to *Robert Blair*, his heirs, executors, administrators and assigns upon trust for the sole and separate use of *Catherine Blair*, *Sarah Farmer*, and *Eliza Farmer*, and their respective heirs, executors, administrators, and assigns, as tenants in common, free from the debts, control, or engagements of their respective husbands, it was witnessed that for and in consideration of his natural love and affection for his said sisters, and the nominal consideration of 10*s.*, *Francis L. Burman* granted, bargained, sold, released, and confirmed to *Robert Blair*, (in his actual possession then being by virtue of a bargain and sale to him thereof, made in consideration of 5*s.* by indenture, bearing date the day next before the day of the date thereof, for the term of one year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and to his heirs, all that one undivided share of and in certain stables in *Cleveland Mews* near *King Street*, in the parish of *St. James*'s, in the City of *Westminster*, to hold the same to *Robert Blair* his heirs and assigns, to the only proper use and behoof of *Robert Blair*, his heirs and assigns for ever, but upon the trusts thereinafter mentioned. And for the considerations aforesaid, *F. L. Burman* did thereby also grant, bargain, sell, transfer, and assign to *Robert Blair*, his executors, administrators, and assigns, all that undivided fifth part of the residue then to come, and

and unexpired, of a term of years, of and in a house No. 1. *Lower Grosvenor Place*, in the county of *Middlesex*, and all other the property situate in *Great Britain* and *Ireland* or any part thereof, whether real or personal, to which, he, the said *F. L. Burman*, might be entitled at the time of the execution of the said indenture, upon trust and confidence, that *Robert Blair*, his heirs, executors, administrators, and assigns should stand possessed thereof, upon trust to pay the rent, interest, dividends, or annual produce arising therefrom, or the monies arising from the sale thereof or of any part or parts thereof, unto and equally between and amongst *Catherine Blair*, *Sarah Farmer*, and *Eliza Farmer* and their respective assigns; and *F. L. Burman* did authorise and empower *Robert Blair*, his heirs, executors, administrators, and assigns, to sell either by public auction or private contract all or any part or parts of the premises aforesaid.

The house in *King Street*, *Westminster*, was not mentioned in the lease or release. Major *Burman* died in the year 1831, having made a will not duly attested to pass real estate, leaving his nephew the Defendant *Edward John Burman*, an infant, his heir at law.

The bill was filed by the personal representative of *Sarah Farmer* and *Eliza Farmer*, the deceased sisters of Major *Burman*, and by parties interested under the will of the purchaser of the house in *King Street*, against *Robert Blair* and *Catherine* his wife, the surviving sister of Major *Burman*, and against the heir at law; and it prayed that the heir at law might be declared a trustee of the legal estate of Major *Burman*'s interest in the house in *King Street*, for the sisters of Major *Burman*.

1837.

DOUNGSWORTH v. BLAIR.

Mr. *Pemberton*, for the Plaintiffs.

The house in *King Street*, not being mentioned in the lease, will not pass to the sisters of Major *Burman*, under the deed of the 22d of *October* 1827, *quà* release, but that instrument recites that the conveyance was made out of the natural love and affection which Major *Burman* bore to his sisters, and will take effect as a covenant to stand seised. The house in *King Street* is clearly comprised in the general words, "all other the property situate in *Great Britain* and *Ireland*, whether real or personal."

Mr. *Spurrier*, *contrà*.

The deed specifies, in the recital, the particular property which Major *Burman* intended to convey, namely, the freehold stables in *Cleveland Mews*, and the leasehold house in *Lower Grosvenor Place;* and this particular property is afterwards conveyed in terms suited respectively to the nature of each portion of it, namely, the freehold to *Robert Blair*, his heirs and assigns; and the leasehold to *Robert Blair*, his executors, administrators, and assigns. It is true that, in the clause in which he conveys the leasehold, he also mentions "all other his property situate in *Great Britain* and *Ireland*, whether real or personal;" but as there are no words of limitation to *Robert Blair*'s heirs, no freehold estate can pass under that clause. The word "heirs" in the subsequent clause, which declares the trust, will not aid that defect, for it is settled that if the word "heirs" is not mentioned in the granting part of a deed, or in the *habendum*, the mention of that word in the recitals, or in any other part of the instrument, will not be sufficient.

The

1837.

DOUNGSWORTH v. BLAIR.

The power of sale given to *Blair*, his heirs, executors, &c., is for the same reason inoperative, because *Blair* took no previous legal estate; and though the power itself might have given him the legal estate in a will, it can have no such operation in a deed.

As to the supposition that the deed will operate as a covenant to stand seised, there is no consideration of blood between the grantor and *Blair*, that can raise a use to support such a covenant. *Blair* was a mere stranger, and no otherwise connected with the grantor than as he had married one of his sisters. If there had been the consideration of blood between *Burman* and *Blair*, *Blair* might have taken the estate as covenantee, subject to the trust for the sisters of the covenantor; but a covenant to stand seised with a stranger cannot raise a use for the benefit of a third person; and though there is the consideration of blood between the covenantor and the *cestuis que trust*, a court of law looks only to the relation which subsists between the parties to a covenant to stand seised, which is a common law assurance. That point was decided in *German* v. *Risley* (*a*), where by an indenture between *Paul Risley* of the one part, and *Thomas Risley* his brother, and three strangers of the other part, *Paul Risley*, out of the love and affection which he bore to his wife and children, covenanted with his brother, and the three strangers, to settle his lands upon the trusts therein mentioned for his wife and children, and the Court held that the covenant was void as to the strangers, but good as to *Thomas Risley* the brother alone. (*b*)

Mr.

(*a*) *Sir W. Jones*, 418.

(*b*) As to this point, which the ground upon which this case was determined rendered immaterial, see *Thorne* v. *Thorne*, 1 *Vern.* 141., where a feoffment without

1837.

DOUNGSWORTH v. BLAIR.

Mr. *Pemberton*, in reply.

The clear intention of Major *Burman* was to convey, for the benefit of his three sisters, the property described in the deed, and all other his real property in *Great Britain* and *Ireland*; and the recitals of the deed, the word "heirs" in that part of the deed which declares the trust, and the power of sale given to *Blair*, his heirs, executors, &c., are sufficient to effectuate that intention.

There is no foundation for the objection that there is a want of consideration in blood between the parties to the deed, and that it cannot therefore take effect as a covenant to stand seised; for, besides the consideration of blood between the covenantor and the *cestui que trust*, there is the consideration of marriage between the covenantee and the covenantor's sister, and that will raise a use by implication, which is sufficient; *Rolle's Abr.* (*a*) In the present case, the consideration between the parties to the deed is a meritorious one, and therefore of such a nature as to induce a court of equity to aid, if possible,

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without livery to trustees, (not relations of the feoffor,) to stand seised to the use of the feoffor's three brothers was held by the Lord Keeper, *without any difficulty*, to operate as a covenant to stand seised. It is to be observed, however, that none of the reports of the case of *Crossing* v. *Scudamore*, 2 *Lev.* 9., 1 *Mod.* 175., 2 *Keb.* 754. 784., and 1 *Vent.* 137., referred to in the text of *Vernon*, support the point for which it seems to be cited, and which the case of *Thorne* v. *Thorne* appears to decide; and that, at law, if a man made a covenant to stand seised to the use of himself for life, remainder to the use of trustees (strangers) to support contingent remainders, remainder to the covenantor's first and other sons in tail, &c., no use would vest in the trustees, which is the principal reason why covenants to stand seised have fallen into disuse. See *Thompson* v. *Attfeild*, 1 *Vern.* 40., and the cases there referred to in Mr. *Raithby*'s note.

(*a*) vol. ii. 782. pl. 3. 783. pl. 1. & 784. pl. 2, 3. The case in *Rolle's Abr.* vol. ii. p. 784. pl. 3. would be in point, but there seems to have been a conflicting decision.

ble, a defective execution of the instrument. In a recent case, the late Lord Chancellor of *Ireland* decreed the specific performance of an agreement, founded only upon a meritorious consideration; *Ellis* v. *Nimmo*. (*a*)

1837.

DOUNGSWORTH *v.* BLAIR.

The MASTER *of the* ROLLS.

Aug. 9.

The single question in this cause is, whether the indenture of release can be considered as a covenant by Major *Burman* to stand seised of the house to the use of *Robert Blair* in trust for his sisters; and, from the words in which it is expressed, I am of opinion that it cannot.

An indenture, which is intended to be an indenture of release, but cannot operate as such, may, for the purpose of carrying into effect the intention of the parties and if there be a proper consideration, be construed as a covenant to stand seised.

But when the question is, whether it is to take effect as a covenant to stand seised of a particular property, it is to be seen whether the words are such as clearly to affect that particular property.

In this case Major *Burman*'s share of the house in question is not named in the deed, nor affected by it, unless it be comprised within the meaning of the general words, by which it was purported that Major *Burman* disposed of all the other property situate in *Great Britain* or *Ireland*, whether real or personal, to which he was entitled at the time of executing the deed.

Now

(*a*) *Lloyd & Goold*, 333.

1837.

DOUNGSWORTH v. BLAIR.

Now it appears from the deed that Major *Burman* knew he was entitled to, and that he intended to dispose of, both freehold and leasehold estate, and the two sorts of property are disposed of by distinct words. The freehold is particularly described, and is conveyed to *Robert Blair*, his heirs and assigns, and no general words are appended to the description so as to shew an intention to convey more than the particular description extends to; and, after this, the deed purports to bargain, sell, transfer, and assign to *Robert Blair*, his executors, administrators, and assigns, the leasehold interest, particularly described, and all other the property of Major *Burman* in the words I have before mentioned.

After this the trusts are declared, and in declaring them, it is directed that *Robert Blair*, his heirs, executors, administrators, and assigns, shall stand possessed of the property on those trusts, and on subsequent occasions when the trustee is named, his heirs and executors are also mentioned.

I am of opinion that the words, heirs and executors, must be taken *reddendo singula singulis*, with reference to the respective natures of the property before described; and that, in the way in which the deed is framed, the general words do not comprise freehold, but only leasehold, or other personal estate; and under these circumstances, I think that the bill must be dismissed with costs as against the heir, but without costs as to the other Defendants.

1836.

The ATTORNEY-GENERAL *v.* TODD.

1836. *Feb.* 17.
1837. *April* 10.

A testatrix by her will, dated in the year 1680, gave to *C.* and his heirs a rent-charge issuing out of the lands therein described, and subject to the rent-charge, she gave the lands to *W.* and his heirs; and by a paper of instructions, reciting, that from the malignancy of the times she could not declare the uses to which she intended the rent-charge to be disposed, she gave the same to *C.* and his heirs upon the trusts hereinafter mentioned; and she requested and desired *W.* that a particular estate therein mentioned should always be let to farm to some deserving Catholic, qualified to entertain a priest for the help of poor Catholics, in the parishes therein specified; and she desired that a *Dominican* or *Franciscan* priest, if a priest of such order could be conveniently had, should be kept at the particular estate, and she gave 20*l.* per annum out of the rent-charge for the maintenance of such priest. The information was filed before the passing of the act 2 & 3 *W.* 4. *c.* 115.:

Held, that the direction in the paper of instructions was illegal and void, but given for a charitable purpose, and applicable therefore *cyprès* to a charitable purpose, to be determined by the sign manual of the Crown.

URSULA MOUNTNEY by her will, dated the 16th of *July* 1680, gave to *Ralph Clavering* and his heirs, an annuity or rent-charge of 32*l.* issuing out of her lands therein described, and, subject to the annuity, she gave the lands to *William* Lord *Widdrington* and his heirs.

By a paper of instructions, dated the 21st of *August* 1680, after reciting the gift of the rent-charge, she proceeded as follows:—"Whereas, by reason of the malignancy of the times, I could not, by my last will, declare the use or uses to which I intended the said sum of 32*l.* per annum should be disposed, I did therefore give and bequeath the same to the said *Ralph Clavering* and his heirs; yet, nevertheless, my said devise was and is, and I do hereby declare the same to be upon special trust, and to the intent and purpose only, that the money arising and growing due and payable by virtue of the rent-charge granted to *Ralph Clavering* and his heirs, by my said last will and testament, shall be disposed of as by this my writing under my hand and seal, I shall hereafter nominate and appoint. Imprimis, I do request and desire my honourable friend and kinsman, *William* Lord *Widdrington*, that *Stonecroft Nunbush* with the appurtenances

1836.

The Attorney-General v. Todd.

purtenances may always be let to farm to some deserving Catholic, qualified to entertain a priest for the help of poor Catholics in *Hexham* and *Warden* parishes, and other places near adjacent. And whereas my dear brother, Mr. *John Widdrington*, late deceased, did, by his last will, order and appoint that a Dominican or Franciscan priest should be kept at *Stonecroft*, I do hereby order and desire that the same may be performed accordingly, if a priest of any such order can be conveniently had. And I do give 20*l.* per annum to the priest that shall serve at *Stonecroft* for his maintenance, to be paid yearly out of the aforesaid rent-charge of 32*l.* per annum, at such feasts and days of payment as the same shall become due and payable by virtue of my said will. And for the residue of the aforesaid sum of 32*l.* per annum, I do hereby order the same to be disposed of as followeth; namely, I do give 3*l.* a year to the poor of *Warden* parish; 3*l.* a year to the poor of *Hexham* parish; 40*s.* a year to the poor of *Chollerton* parish; 20*s.* a year to the poor of *St. John Lee* parish; 20*s.* a year to the poor of *Corbridge* parish, to be paid yearly and for ever at such feasts or days as by my trustees hereinafter nominated and appointed to receive the same shall be thought fit and convenient. And I do give 40*s.* a year for ever unto such person or persons as shall be employed to receive and distribute the 10*l.* a year to the poor of the several parishes above-mentioned, for their labour and expenses in and about the receiving and distributing thereof."

In the year 1693 *William* Lord *Widdrington*, the devisee of *Ursula Mountney*, conveyed the *Stonecroft* estate, subject to the rent-charge of 32*l.*, to *Thomas Gibson* and his heirs; and *Thomas Gibson* and his heirs covenanted that he and they would pay the annuity of 32*l.* to the heirs and assigns of *Ralph Clavering*.

The

1836.
The Attorney-General v. Todd.

The *Stonecroft* estate continued in the possession of *Thomas Gibson* and his family till 1816, when *Jasper Gibson*, the then owner, conveyed it to trustees for sale. It was put up for sale in *June* 1822, and in the particulars and conditions of sale, was described to be subject to a rent-charge of 32*l.* a year, and *John Todd* became the purchaser, subject to those conditions.

Up to the time of this purchase, it was stated that the 10*l.* a year had been duly paid to the poor of the parishes named in the paper.

John Todd died on the 22d of *September* 1830, having devised the estate to *William Todd*, and made *William Todd* and *Nicholas Todd* his executors; and, on the 15th of *August* 1830, *Edward Clavering*, the heir of *Ralph Clavering* the devisee of the rent-charge, conveyed and assigned the rent-charge to *Nicholas Leadbitter*.

The original information was filed *ex officio* by the Attorney-General on the 5th of *September* 1831, against *Willium Todd* and *Nicholas Todd*, and against *Edward Clavering*, in whom the rent-charge was supposed to be vested; but, it appearing that the rent-charge had been assigned to *Leadbitter*, the information was amended on the 11th of *January* 1833, by substituting *Leadbitter* as a party Defendant for *Edward Clavering*.

The information prayed that the charity therein mentioned might be established, and that it might be declared that the sum of 20*l.* per annum, part of the rent-charge of 32*l.* per annum, was vested in his Majesty, and by his consent applicable to the purposes of the said charity, or otherwise at his Majesty's disposal by his sign manual; and that an account might be taken of the rent-charge of 32*l.* per annum, and that, if necessary,

a reference

1836.

The Attorney-General v. Todd.

a reference might be directed to the Master to approve of a scheme for the regulation of the charity.

The Defendants *William Todd* and *Nicholas Todd*, by their answer, admitted that *John Todd* paid some arrears of 10*l.* a year given to the poor, but refused to make payment of the 20*l.* a year, insisting, as the Defendants then insisted, that the rent-charge of 32*l.* was, by the will of the testatrix, charged on *Stonecroft* jointly with other estates, and that the *Stonecroft* estate was chargeable only with a proportional part of the rent-charge. And they said, that if it should appear upon production of the paper of instructions, or any deed for establishing the charity or otherwise, that *William* Lord *Widdrington* lawfully charged the *Stonecroft* estate with the whole of the rent-charge of 32*l.* in exoneration of the other estates charged therewith by the will, they were ready and willing to account for the same, and in all respects to act in the premises in such manner as the Court should direct.

The Defendant *Leadbitter* submitted by his answer, that the annual sum of 20*l.*, part of the rent charge of 32*l.*, was payable to such Roman Catholic priest as was mentioned or provided for in the paper of instructions signed by the testatrix. It was proved, by production of deeds, dated in the month of *May* 1693, that *William* Lord *Widdrington* charged the *Stonecroft* estate exclusively with the payment of the rent charge of 32*l.* a year.

Mr. *Kindersley* and Mr. *Heberden*, in support of the information, said that as this information was filed before the passing of the act 2 & 3 *W.* 4. *c.* 115., it was clear that that act could have no application; that the gift for the support of a Roman Catholic priest, being a gift for promoting

1836.

The Attorney-General v. Todd.

promoting a religion contrary to the established one, was void, but being in the nature of a charitable gift for a religious purpose, which could not be distinguished from a charitable purpose, it devolved upon the Crown to direct its application to a *cyprès* charitable purpose by its sign manual directed to the Attorney-General: *Attorney-General* v. *Baxter* (*a*), *Attorney-General* v. *Guise* (*b*), *De Costa* v. *De Paz* (*c*), *Cary* v. *Abbot.* (*d*)

Mr. *Lynch*, for the Defendant *Leadbitter.*

In the case of *West* v. *Shuttleworth* (*e*), it was decided that a bequest to promote the knowledge of the Roman Catholic religion was a valid bequest; and in *Bradshaw* v. *Tasker* (*g*), it was held that the act of the 2 & 3 *W.* 4. *c.* 115., which puts persons professing the Roman Catholic religion upon the same footing, with respect to their schools, places for religious worship, education and charitable purposes, as Protestant Dissenters, was retrospective. The third section of that act provides that nothing contained in it shall affect any suit actually pending or commenced, or any property then in litigation, discussion, or dispute, in any court of law or equity. It is true that this suit was commenced before the passing of the act, but *Leadbitter* was not made a Defendant until *July* 1833, which was after the act had passed, and so far as his interest is concerned, which indeed involves the whole matter in dispute, there was no pending litigation until after the act of the 2 & 3 *W.* 4. *c.* 115. came into operation. If a bequest for the propagation of the Roman Catholic religion be good — and this cannot now be disputed — it seems impossible to

(*a*) 1 *Vern.* 248. reversed, as to the particular case, in the *Attorney-General* v. *Hughes*, 2 *Vern.* 105.

(*b*) 2 *Vern.* 266.

(*c*) *Ambl.* 228.; and more fully 2 *Swanst.* 487. n.

(*d*) 7 *Ves.* 490.

(*e*) 2 *Mylne & Keen*, 684.

(*g*) 2 *Mylne & Keen*, 221.

1836.

The Attorney-General v. Todd.

to contend that a bequest for the maintenance and support of a Roman Catholic priest can be unlawful, for the promotion of the religion being a lawful object, the encouragement and support of the priests, by whom that religion is to be taught, must be equally lawful. In *Cary* v. *Abbot* (*a*), Sir *W. Grant*, though he decided that a bequest for educating children in the Roman Catholic faith was void — a decision which, even at that time, may be considered as doubtful — made a most important concession for the purposes of the present argument, and that was, that there was no statute making superstitious uses void generally, the statute of 1 *Ed.* 6. *c.* 14. relating only to superstitious uses of a particular description then existing. The devise in the present case does not fall within any of the particular superstitious uses declared to be void either by the statute of *Henry* 8. (*b*), or by the statute of *Ed.* 6.; and, although it would undoubtedly have fallen within the provisions made by the severe penal laws which were afterwards enacted against Roman Catholics, yet, as all those penal laws have been repealed, and as Roman Catholics are put upon a complete equality with Protestant Dissenters in respect to their religious worship, a bequest for the support of a Roman Catholic priest is no longer contrary to the policy of the law. In the *Attorney-General* v. *Pearson* (*c*), Lord *Eldon* said that a trust for maintaining a society of Protestant Dissenters, holding doctrines not contrary to law, though at variance with the doctrines of the established church, was a trust which it would be the duty of a court of equity to carry into execution. And as Roman Catholics now stand, with reference to their rights in respect of religious worship, exactly in the same situation as Protestant Dissenters, there can be no doubt that it is equally

(*a*) 7 *Ves.* 490.
(*b*) 37 *H.* 8. *c.* 4.
(*c*) 3 *Mer.* 409.

1836.

The Attorney-General v. Todd.

equally the duty of this Court to carry into execution a trust which has for its object the promotion of the Roman Catholic religion. In *De Costa* v. *De Paz* (*a*), Lord *Hardwicke* decided that a bequest for propagating the Jewish religion was unlawful, but that decision went upon a principle which does not apply to a bequest for the promotion of the Roman Catholic religion, namely, that the intent of the bequest was in contradiction to the Christian religion, which is part and parcel of the law of the land. The Roman Catholics and the members of the established religion go together to a certain point: both profess Christianity, and, in this respect, the doctrines of both are equally consistent with the policy of the law. In *West* v. *Shuttleworth* (*b*), the present Lord Chancellor, when Master of the Rolls, held a bequest to Roman Catholic priests, that the testatrix might have the benefit of their prayers for the repose of her soul, to be void, as falling within the meaning, though not within the letter, of the superstitious uses intended to be suppressed by the statute of 1 *Ed.* 6. No such condition is here annexed to the bequest, nor can the testatrix be presumed to have had any other design in creating this trust for the support of a Roman Catholic priest, than the pious purpose of promoting the religion which she professed, a purpose which would now not only be lawful, but which a court of equity would be bound to see executed, and to which, by the act of the 2 & 3 *W.* 4. *c.* 115., the operation of which Lord *Brougham* has declared to be retrospective, this Court is enabled to give effect.

Mr. *Pemberton* and Mr. *Wray*, for the executors of *Todd*.

The

(*a*) *Ambl.* 228.; and 3 *Swanst.* 487.

(*b*) 2 *Mylne & Keen*, 684.

1836.

The Attorney-General v. Todd.

The executors have themselves no interest in the subject of this discussion, further than that, if this gift was a fraud upon the law, and consequently void, it is their duty to contend that it ought not to be applied to the unlawful object contemplated by the testatrix. If this gift was in the year 1680 null and void, and if the testatrix herself was so conscious of its illegality that she resorted to a secret declaration of trust with a view to accomplish her unlawful purpose, it is a strange proposition to say that an act passed in the year 1832 shall have the effect of reviving it. According to this doctrine, every superstitious use which the law has declared void, every devise or trust which by statute or otherwise has been declared to be contrary to the policy of the law and therefore void, would be set up and revived by the supposed retrospective operation of the 2 & 3 *W.* 4. *c.* 115. There is nothing in that act from which it can be inferred that it was the intention of the legislature to give it a retrospective operation; no reason was assigned for the decision in *Bradshaw* v. *Tasker*, and the case does not appear to have been argued. The act of the 2 & 3 *W.* 4. *c.* 115., contains a special provision that nothing contained in it shall affect any suit then pending, or any property which was then the subject of litigation, discussion, or dispute in any court of law or equity; and yet it is supposed that, by this very act, it was intended to re-open questions through an indefinite period of time, and to give validity to gifts which the law had for centuries declared to be illegal. When a person grants or devises an estate and makes a declaration of trust by the same or a different instrument for a purpose which is illegal, and which, in this case, the person declaring the trust knew to be illegal, the grantee or devisee will either take the estate discharged from the trust, or there will be a resulting trust for the donor, or testator, and the estate will go to the

1837.

The Attorney-General v. Todd.

the heir-at-law. In this case there is nothing in the unlawful declaration of trust which can possibly be converted into a charitable purpose. In *De Themmines* v. *De Bonneval* (*a*), a person gave to trustees a sum of stock to be applied in promoting the circulation of a particular treatise inculcating the supremacy of the Pope, and the deed contained a proviso that if the trust should be declared void, the trustees should hold the stock in trust for the grantor's executors and administrators. In that case the Court held that the trust had no impress of charity upon it, and was consequently not applicable to any charitable purpose, and that, as the particular purpose failed by reason of its illegality, the stock reverted to the grantor. Applying that principle to the present case, as there is no impress of charity upon the gift, the purchaser *John Todd*, and his representatives, would take the estate discharged from the illegal trust.

Mr. *Kindersley*, in reply.

The object of the testatrix was clearly charitable, though the mode in which she attempted to accomplish that object was illegal; and it devolves upon the Crown, therefore, to give effect to her charitable intentions *cyprès*. *Todd* purchased the estate expressly subject to the trust; and there is no pretence, therefore, for contending that he, or those who claim under him, can take the estate discharged from the trust.

The Master *of the* Rolls.

1837. *April* 10.

Upon consideration of the paper of instructions, I think that the purpose of the testatrix in providing for the priest that was to serve at *Stonecroft* for ever was charitable,

(*a*) 5 *Russ.* 288.

1837.

The ATTORNEY-GENERAL *v.* TODD.

charitable, her intention being that such priest should be a help to poor Catholics.

The intention being charitable, was the proposed mode of carrying that intention into effect legal? Before the statute 2 & 3 *W.* 4. *c.* 115., there could, I apprehend, be no doubt that the proposed mode of carrying the charitable intention into effect was illegal, and the Crown would have been entitled, under the King's sign manual, to direct the application of the fund to other charities in a legal mode.

Has, then, the statute I have mentioned any operation in this case? The information was filed on the 5th of *September* 1831, against the persons in whom the property subject to the charge was vested, and against *Edward Clavering*, in whom it was alleged the rent charge was vested. The *Todds* put in their answer in *March* 1832, and stated their belief that the rent charge was vested in *Edward Clavering*, which it had been, but was not at that time. The stat. 2 & 3 *W.* 4. *c.* 115. received the royal assent on the 16th of *August* 1832. The information was amended, and *Leadbitter* made a party in *January* 1833, and he answered in *June* in the same year.

The third section of the statute enacts that nothing therein contained shall affect any suit actually pending or commenced, or any property then in litigation, discussion, or dispute in any of his Majesty's courts of law or equity in *Great Britain.*

And although Mr. *Leadbitter* was, under a mistake, not made a party to this information, when filed before the statute, it is impossible for me to consider that this suit was not commenced, and that this rent-charge as against

1837.

The ATTORNEY-GENERAL *v.* TODD.

against the property charged with it, and the persons liable to pay it, was not in litigation, discussion, and dispute at the time when the statute was passed, and I am therefore of opinion that the case must be determined, as if that act had not passed; and looking to that which I consider to be the established practice of this Court in cases where the purpose is charitable, but the mode of effecting it illegal, I am of opinion that it devolves upon the Crown to state to what charitable purpose the 20*l.* a year is to be applied.

Mr. *John Todd* purchased the estate with full knowledge of the charge in the year 1822, and from that time appears to have refused to pay it; but I think that his estate, and the persons who have possessed the property since his death, ought to be charged with the rent-charge from the time of his purchase.

Declare that the direction to pay 20*l.* a year to maintain a priest to serve at *Stonecroft* was illegal and void, but that the sum of 20*l.* a year was given for a charitable purpose, and that the same ought to be applied to some other charitable use; and that the appointment and direction of such other charitable use is in the Crown, and the Court recommends the Attorney-General to apply to the King for a sign manual to appoint and direct to what charitable use or uses the annual sum of 20*l.*, part of the said rent-charge of 32*l.*, and the arrears shall be applied.

Take an account from the time of the purchase by *John Todd:* the costs of the informant as between party and party to be paid by the *Todds;* the costs of the trustee *Leadbitter*, and the extra costs of the informant, to be paid out of the arrears.

1837.

August 10.

TURNER *v.* HITCHON.

Under the eighty-second New Order of 1831, the *subpœna* to hear judgment may be made returnable on any day out of term, and a cause may be set down for hearing in the cause-book for the same term in which publication has passed.

MR. *WALKER* moved that this cause might be struck out of the cause paper, and the *subpœna* to hear judgment discharged, on the ground that it had been set down to be heard in the same term in which publication had passed. *Trinity* term commenced on the 22d of *May;* publication passed by rule on the 5th of *June*, and the *subpœna* to hear judgment was served on the 26th of *June*, and made returnable on the 12th of *July;* and the cause was set down to be heard in the cause-book for *Trinity* term. This was contrary to Lord *King*'s order of * the 9th of *July* 1725, by which it was ordered that no cause should be set down to be heard in the same term in which publication passed, and had been held to be irregular in *Lord* v. *Genslie*. (*a*) He contended that the practice in this respect had not been altered by the eighty-second of Lord *Brougham*'s amended New Orders (*b*), which was not intended to abrogate Lord *King*'s order, and which was founded in part upon the mistaken supposition that a cause could not

* *Beames*'s Orders, p. 335.

(*a*) 5 *Mad.* 83.

(*b*) The eighty-second New Order is as follows:—

"And whereas the present practice, that causes can only be entered for hearing during the time of term, and that the *subpœna ad audiendum judicium* can only be then returnable, is productive of great delay and inconvenience, it is hereby further ordered by the said Lord High Chancellor, with the advice and assistance aforesaid, that from henceforth causes may be set down for hearing, and the *subpœnas ad audiendum judicium* served and returnable on any day, as well out of term as in term, and this order is to be called the eighty-second order."

1837.

TURNER v. HITCHON.

not be set down for hearing in the vacation. That a cause might be regularly set down for hearing in the vacation, appeared from the case of *Partridge* v. *Cann.* (*a*) Supposing the eighty-second order not to interfere with Lord *King*'s order, it would still have a beneficial effect in providing that *subpœnas* to hear judgment might be returnable out of term as well as in term, which they were not under the former practice. The Six Clerks considered that a cause could not regularly be set down to be heard in the cause-book for the same term in which publication had passed.

The MASTER *of the* ROLLS.

In the expression "setting down or entering the cause for hearing," the day on which the cause is set down, is to be distinguished from the day appointed for hearing the cause. Previously to the eighty-second order, the days appointed for hearing causes, or the days on which *subpœnas* to hear judgment were made returnable were either in, or considered to be as of the time of term; and I apprehend that consistently with the practice, the cause might on any day after *Easter* term, and before the third seal after *Trinity* term be regularly set down to be heard in or as of *Trinity* term; though in an adverse case, such setting down would not be available for an actual hearing in or as of *Trinity* term, unless it took place a sufficient time before the third seal after *Trinity* term to allow of due service of the *subpœna*. Lord *King*'s order was intended to prevent causes being set down before publication, and to give the parties sufficient time to prepare for the hearing; and the effect of it was, that the day on which the cause was appointed to be heard should not,

(*a*) 1 *Sim. & Stu.* 466.

1834.

TURNER v. HITCHON.

not, without special order, be in the same term with the day on which publication passed. The eighty-second order after reciting, that the practice of making the *subpœna* to hear judgment returnable in term time only was productive of great delay and inconvenience, directs, in words the meaning of which admits of no doubt, that the *subpœna* may be made returnable on any day as well out of term, as in term. In the present case, publication passed on the 5th of *June*, which was in *Trinity* term: the cause was set down to be heard, and the *subpœna* to hear judgment was made returnable on the 12th of July which was out of term and more than a month after publication passed. The *subpœna* itself being in the form directed by the orders of *December* 1833 is of course silent as to term time or vacation, and merely commands the Defendant to appear on a certain day (viz. the 12th of *July*) or whenever thereafter the cause shall be heard. The proceeding appears to me to be regular, and fully warranted by the eighty-second order. It would be strange, if the Court, instead of discouraging fictions, should for the purpose of defeating that order, and for no useful purpose suggested, consider the 12th of *July* as a day in the term which ended on the 12th of *June*, and without this fiction, there is no pretence of irregularity as to the *subpœna* or the service of it. Why, then is it to be discharged? It is said, indeed, that the cause is set down to be heard in the cause-book for *Trinity* term, which means, I presume, the cause-book for *Trinity* term, and the sittings afterwards; but this is evidently immaterial as the cause could not, under any circumstances, have been heard before the 12th of *July*, and must now come on in its due turn. I think that there is no ground for this application; and the motion is dismissed with costs.

1836.

COOKSON *v.* HANCOCK.

1836.
April 26.

A testator by his will gave 3000*l.* to his brother *B.* for his life, with remainder to his wife for her life, remainder to his children; and he gave 6000*l.* to his sister *S.* for her life, with remainder to her husband for his life, remainder to her children; and after giving 10*l.* a year each to his two maid servants, for their lives, he gave his real estate, and the residue of his personal estate and effects to his sister *H.*

By a codicil, described as a codicil to his will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with limitations, after his decease, for the benefit of his wife and children; and his sister *S.* was to have an equal share with his sister *H.*

By a second codicil he left to his two maid servants 10*l.* a year each for their lives.

The testator's sister *S.* survived her husband, and died leaving two children:

Held, that *S.* was entitled, under the first codicil, to one-third share of the testator's personal estate, subject to the same limitations declared by the testator with respect to the legacy of 6000*l.* which had been given by the will.

THOMAS BAKER, by his will, dated the 26th of *January* 1826, gave and bequeathed to his brother, the Defendant, *George Baker*, the interest of 3000*l.* for his life, and after the decease of *George Baker*, he directed that the principal sum of 3000*l.* should be on trust for the said *George Baker*'s children, share and share alike, provided *George Baker*'s wife should not be then living; but in case she should be then living, he directed that 2000*l.*, part of said sum of 3000*l.* should only be in trust for the said children at the death of his, the testator's, brother; and that the interest of the remaining 1000*l.* should be paid to the wife of his said brother for her life; and that at her decease, the said sum of 1000*l.* should be in trust for the said children, share and share alike. And the testator gave and bequeathed the interest of 6000*l.* to his sister *Catharine Smith* for her life; and in case her husband *Thomas Smith* should survive her, he gave and bequeathed the interest of the said sum of 6000*l.* to him for his life, and from and after the decease of the survivor of them, his said sister and her husband, he directed that the said principal sum of 6000*l.* should be in trust for their children, share and share alike; and he gave and bequeathed to his two maid servants, the sum of 10*l.* a year a piece for their re-

1836.
COOKSON v. HANCOCK.

respective natural lives, and as to all his real estates whatsoever and wheresoever, and all the rest, residue, and remainder of his personal estate and effects whatsoever, not therein before disposed of, he gave, devised, and bequeathed the same, and every part thereof to his sister the Defendant *Jane Hancock*, her heirs, executors, administrators, and assigns, according to the several natures and tenures thereof; and he appointed *John Philipson* and *Thomas Smith* executors of his will.

The testator afterwards made two codicils to his will, which were unattested. The first of these codicils was dated the 3d of *January* 1827, and was in the following words: — "Codicil to my will. I hereby leave my brother *George Baker* an equal share of my effects with my sisters, to have the interest during his life, and after his decease the principal to be divided amongst his children, share and share alike, provided his wife should not be then living; but in case she shall be then living, in such case she shall have the interest of 1000*l.* during her life, and at her decease the said sum of 1000*l.* shall be in trust for the said children, share and share alike: my sister *Catharine Smith* to have an equal share with my sister *Jane Hancock*."

The second codicil, dated the 29th of *November* 1828, was as follows: — "Codicil to my will. I leave to my two maid servants each 10*l.* a year during their natural lives; and I appoint Mr. *John Hunter* to act with Mr. *Thomas Smith* and Mr. *John Philipson* as trustees.

The testator died in the month of *April* 1829, leaving his brother *George Baker* and *Elizabeth* his wife, and their six children, his sister *Catharine Smith*, and *Thomas Smith* her husband, and his sister *Jane Hancock* surviving him; and his will and codicils were proved by *John*

John Smith alone, who died on the 15th of *May* in the same year; and the other executors, named in the will, having renounced probate thereof, administration with the will and codicils annexed, was granted to the Defendant *Jane Hancock*.

Catharine Smith survived her husband, *Thomas Smith*, and died on the 10th of *August* 1833, leaving two children, the Defendant *Edward Smith*, and *Elizabeth Smith*, who intermarried with the Plaintiff *Charles Cookson*. *Elizabeth Cookson* died in the month of *April* 1833, and the Plaintiff thereupon took out administration to her personal estate.

The bill was filed by the Plaintiff against *Jane Hancock*, *George Baker*, and his wife and their children; and the Plaintiff, as administrator of his deceased wife, claimed to be entitled to one moiety of the legacy of 6000*l*., and one sixth part of the residuary personal estate of the testator.

Sir *Charles Wetherell*, Mr. *Kindersley*, and Mr. *Purvis*, for the Plaintiff.

The first codicil is a revocation of the will, so far as the residuary personal estate of the testator is concerned, and no farther. He revokes that part of his will by which he had made his sister *Jane Hancock* his residuary legatee; and he gives, by his codicil, to his brother *George Baker* an equal share of his effects, that is, of his residuary effects with his sisters, the principal to be divided after his decease among his children; and in like manner, the testator's two sisters were to have an equal share. The legacy of 6000*l*. which he had given by his will to the children of his sister *Catharine Smith*, after the decease of her and her husband, is left wholly

1836.
COOKSON v. HANCOCK.

wholly untouched by the codicil. To determine whether legacies given by different instruments are cumulative or substitutional, the rule which has been laid down is, that where a testator leaves two different instruments, and in both has given a legacy *simpliciter* to the same person, the Court will consider, that he, who has twice given, intended to make two gifts, and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first; but where the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum given, the Court will consider these coincidences as raising a presumption that the testator intended only a repetition of the former gift by the second instrument: *Hurst* v. *Beach* (*a*), *Wray* v. *Field* (*b*), *Foy* v. *Foy* (*c*), *Baillie* v. *Butterfield* (*d*), *The Duke of St. Alban's* v. *Beauclerk* (*e*), *Hooley* v. *Hatton* (*g*), *Coote* v. *Boyd* (*h*). According to this rule, one gift cannot be presumed to be substitutional for another unless it be of the same kind and to the same amount, and unless the same motive for the gift is expressed. In this case there is no coincidence either in the nature or in the amount of the gift of the legacy by the will, and of the testator's effects by the codicil, and no motive for the gift is expressed that can raise any inference of an intention. In *Gillespie* v. *Alexander* (*i*) there were circumstances, on the face of the two instruments, which induced the Court to hold that legacies given to the same persons, and in some instances of different amounts were substitutional: here there are no such circumstances. Supposing the share of the residue to be given to *Catharine Smith* in addition

(*a*) 5 *Mad.* 351.
(*b*) 6 *Mad.* 300.
(*c*) 1 *Cox*, 163.
(*d*) 1 *Cox*, 392.
(*e*) 2 *Atk.* 636.
(*g*) 1 *Bro. C. C.* 390. n.
(*h*) 2 *Bro. C. C.* 521.
(*i*) 2 *Sim. & Stu.* 145.

1836.

COOKSON v. HANCOCK.

addition to the legacy of 6000*l.* it will follow that such share was to be held upon the same trusts for the benefit of her children as the legacy of 6000*l.* The cases of *Rawlings* v. *Jennings* (*a*) and *Doe dem. Hick* v. *Dring* (*b*) are authorities which shew that the word "effects" will not admit of a larger construction than the context requires, and in this codicil the testator plainly intended to apply that term to his residuary estate.

Mr. *Pemberton* and Mr. *Bagshawe*, *contrà*.

The question is, whether the testator has not, by his two codicils, revoked the whole of his will, and made a totally different disposition of the whole of his personal property. By the first codicil, he gives to his brother, *George Baker*, an equal share of his effects with his sisters for his life, and after his decease the principal to be divided among his children, meaning by "effects" the whole of his personal property. He gives to his sister *Catharine* an equal share with his sister *Jane Hancock*, and the way in which the Plaintiff seeks to establish this equality is by claiming for *Catharine Smith* 6000*l.* more than her sister is alleged to be entitled to. The assets amount to upwards of 24,000*l.*; and if *Catharine Smith* was entitled to the 8000*l.* as well as to a third of the residue, *George Baker*, by parity of construction, would be entitled to the 3000*l.* given by the will as well as to a third of the residue, and there would remain, according to this construction, a sum of 13,000*l.* to be divided between the brother and two sisters. It is plain, however, that the equal division of the testator's whole effects, directed by the codicil, is a substitution for the unequal division of his whole property

(*a*) 13 *Ves.* 39. (*b*) 2 *M. & Selw.* 448.

1836.
COOKSON
v.
HANCOCK.

perty made by the will. The first codicil was not capable of affecting, nor was it intended to affect, the testator's real estate; and it was doubtful whether the legacy, given by the will to his two maid servants, was not also revoked by that codicil: hence the second codicil, in which the testator repeats the gift to the two maid servants. Whether any thing is given by the codicil to the children of *Catharine Smith*, is a more doubtful question; if not, the Defendant *Edward Smith* will be entitled to the whole as executor and residuary legatee under the will of his mother. Nothing is given in the codicil by way of addition to the gift in the will; it is a distinct gift, and therefore not subject to any limitations which are not distinctly expressed. Where the testator intends to give a share of his property with limitations, he gives it in apt words to *George Baker* for life, with benefit of survivorship to his wife, the principal to be divided among his children; where he intends to give an absolute interest, he gives the shares to his sisters without any limitations.

Sir *Charles Wetherell*, in reply.

It is evident by the introductory words of the codicil, that the testator did not mean to revoke the whole of his will. The words "codicil to my will" imply that the will was to remain in force at least for some purposes, and it is conceded on the other side that he did not intend to revoke the gift to the two maid servants. The will exists, therefore, and would have existed, without the repetition or cumulation of the legacy given in the second codicil, for the benefit of the maid servants, and no rational construction can be given to the first codicil, unless it be further conceded that the will exists not only for the benefit of the maid servants, but for the benefit of *Catharine Smith*. By that codicil, the brother

was

1836.

COOKSON v. HANCOCK.

was to have an equal share of the testator's "effects" with the sisters. What effects? the will must be looked to in order to ascertain what he meant by that expression. By the codicil, moreover, *Catharine Smith* was to have an equal share with *Jane Hancock*. And what was *Jane Hancock*'s share? the will must be looked to in order to ascertain that fact; and looking to the will, we find that *Jane Hancock* was to have all the testator's real estate, and all the residue of his personal estate and effects not thereinbefore disposed of. Hence it appears that by the word "effects" in the codicil, the testator meant residuary effects after the previous dispositions made by his will. Upon no other construction could *Catharine Smith* possibly take an equal share of the testator's effects with *Jane Hancock*, for by the will the testator had given unequal shares of his personal estate to *George Baker* and *Catharine Smith*, and to *Jane Hancock* he had given an unascertained share of his personal estate which might have amounted to nothing, and also his real estate. He clearly intended inequality by his will, and, as the equality directed by the codicil can be explained only by reference to the will, that reference shews that he intended only an equal distribution of the residue.

The MASTER *of the* ROLLS.

It is clear that, by the will, the testator intended an unequal distribution among his brothers and sisters, for he gives the interest of 3000*l.* to his brother, *George Baker*, for his life, and after his decease, the principal, subject to the life interest of his wife in a part of that sum, to the children of *George Baker;* but he gives to *Catharine Smith* 6000*l.*, with remainder to her children; and, after a legacy of 10*l.* per annum to each of his two servants, he gives all his real estate, and the residue of his

1836.

COOKSON v. HANCOCK.

his personal estate and effects to his sister *Jane Hancock*. I cannot look at the amount of the residue to ascertain the intentions of the testator; but it is clear, upon the face of the will, that the testator did not intend the shares of his brother and two sisters to be equal. He then makes a codicil commencing with the words "codicil to my will;" the will was, therefore, under his consideration. He proceeds, "I hereby leave my brother, *George Baker*, an equal share of my effects with my sisters," the effect of which disposition is to bring up *George Baker*'s share to an equality with those of his sisters. This is not a disposition of the whole of the testator's effects, but of *George Baker*'s share, and that share is limited over to his wife and children. The testator then continues, "my sister *Catharine Smith* to have an equal share with my sister *Jane Hancock*;" the effect of which disposition is to bring up *Catharine Smith*'s share to an equality with that of *Jane Hancock*. We must look to the will to see what was the share of *Jane Hancock*, which will be the measure of the shares to be allotted to *George Baker* and the other sister. The will gives the residue of the testator's personal estate and effects to *Jane Hancock*; by the codicil she will be entitled to an equal share of the residue with her brother and sister, after payment of the testator's debts, which share, according to the amount of the residue, may be greater or less than the legacy given by the will to *Catharine Smith*. I think that, when the testator speaks of his brother and sisters in the codicil, he speaks of them, not only in their individual characters, but as representing their respective families; and having regard to the will, comparing the will with the codicil, and considering that the testator intended by the codicil to equalise that which was unequal by the will, I am of opinion that he meant to give to *Catharine Smith* a share of his personal estate equal to the shares of her brother

brother and sister, and subject to the same limitations which he had declared by his will with respect to the legacy of 6000*l.*

1836.

COOKSON *v.* HANCOCK.

Declare that *Catharine Smith* was entitled to one third share of the testator's personal estate for her life, with remainder to her two children in equal shares.

This decision was appealed from, and affirmed by the Lord Chancellor.

SAWYER *v.* BIRCHMORE.

Aug. 15

THE decision in this case (*a*) was appealed from, and the decree for the dismissal of the bill was reversed, the Lord Chancellor being of opinion, upon the evidence, that the claims of the Plaintiffs were not concluded by it, but that the Plaintiffs were entitled to an inquiry; and his Lordship accordingly directed an inquiry whether the Plaintiffs were in fact some of the next of kin, and if so, whether they had any notice of the suit in which the fund was distributed, with liberty to the Master to state special circumstances.

(*a*) *suprà*, p. 391.

1837.

January 17.

TYLER *v.* BELL.

When a demurrer for want of parties is allowed, though, in ordinary cases, the Court gives leave to amend by adding parties, it is in the discretion of the Court to grant or refuse such leave; and where the suit was so framed that it could not be prosecuted for any beneficial purpose in this country, leave to amend was refused.

THE bill was filed by the Plaintiff, who was the eldest son of *G. P. Tyler* and *Anna* his wife, as one of the next of kin (with *Anna Tyler* his mother) of *Margaret Maria Moscrop*, who, it was alleged, had died in *India*, intestate, at the age of five years, against *Peter Bell*, to whom letters of administration of the goods of *G. P. Tyler* had been granted, by the Prerogative Court of *Canterbury*, as the attorney of *Anna Tyler* (the mother of the intestate, and widow and legal personal representative in *India*, as well of the said *G. P. Tyler* as of the intestate), during her residence at *Calcutta*, and against *Anna Tyler*, and *W. H. Tyler*, another son of *G. P. Tyler* and *Anna* his wife (alleged to have been born after the death of the intestate), the two last mentioned Defendants being resident in *India*, and alleged accordingly to be out of the jurisdiction of the Court. The bill prayed for an account of the personal estate of the intestate *Margaret Maria Moscrop*, possessed by *Anna Tyler* as the legal personal representative in *India* of the intestate, or by *G. P. Tyler* in his lifetime, and that a moiety of such personal estate might be paid or transferred to the Plaintiff, and for other relief. The bill prayed process against *Bell*, and also against *Anna Tyler* and *W. H. Tyler*, when they should come within the jurisdiction. The Defendant *Bell* demurred to the bill upon two grounds; first, for want of equity, and secondly, because no personal representative of *Margaret Maria Moscrop*, constituted such by any Ecclesiastical Court in *England*, had been made a party to the suit.

Mr.

1837.

TYLER v. BELL.

Mr. *Pemberton* and Mr. *James Russell*, in support of the demurrer, insisted that the bill contained no matter of equity on which any decree could be founded, and was so framed as to be wholly unavailable for any practical or useful purpose, the only actual Defendant being the mere attorney of the principal party against whom the account was sought, and a stranger to all the transactions in respect of which relief was prayed. The bill was filed for an account of the personal estate of an intestate who had no personal representative duly constituted in this country, and who could never by any possibility have a personal representative so constituted, inasmuch as she never had any assets in this country. The suit was, therefore, defective for want of a necessary party; *Lowe* v. *Fairlie* (*a*), *Logan* v. *Fairlie* (*b*), and the defect was, moreover, one which no amendment could cure.

Mr. *Tinney*, Mr. *Kindersley*, and Mr. *Craig*, *contrà*, relied upon the decree in *Adair* v. *Shaw* (*c*) as establishing that the assets of the husband of an administratrix were responsible for all such parts of the property of an intestate as were possessed by the husband and his wife during the coverture, and that as a breach of trust was alleged in the bill against the deceased husband and the administratrix, there was sufficient matter of equity to sustain the suit; and they insisted that, even if the Court should be of opinion that the suit was defective for want of a necessary party, the Plaintiff was entitled, as of course, to leave to amend. A bill was never dismissed for want of parties, it being the invariable practice of the Court to allow a cause, defective only for want of parties,

(*a*) 2 *Mad.* 101.
(*b*) 2 *Sim. & Stu.* 284.
(*c*) 1 *Sch. & Lef.* 275.

1837.

TYLER v. BELL.

parties, to stand over for the purpose of amending the bill by adding the necessary parties.

Mr. *Pemberton*, in reply.

In *Lowe* v. *Fairlie* (*a*) when leave to amend was asked under precisely similar circumstances, Sir *Thomas Plumer* said the application was not of course, but gave time to state in writing what amendment was proposed, nd the application was not renewed. In *Lewis* v. *Gentle*, a case before the present Vice-Chancellor (*b*) a demurrer for want of parties was allowed, and his Honor refused an application for leave to amend. In this case it is clear, from the frame of the suit, that no relief can be given, and the Court will not, it is submitted, in the exercise of its discretion grant leave to amend.

The MASTER *of the* ROLLS (after stating the substance of the bill).

The bill seeks to have an account of the personal estate of *Margaret Maria Moscrop;* and the first question which arises is, how this can be done in the absence of a personal representative in this country of *Margaret Maria Moscrop?* A Plaintiff, claiming by his bill a share of an intestate's estate, must of course bring the legal personal representative of the intestate before the Court, such personal representative being a necessary party to the account which is sought to be taken. Another question has been raised, whether, if a demurrer be allowed on the ground that the proper parties to the suit are not before the Court, it is a matter of course for the Court to grant leave to amend, and to allow the cause to stand over for that purpose. No authority has been

(*a*) 2 *Mad.* 101. (*b*) *Nov.* 3, 1828.

been produced before me in support of such a proposition; and the course, taken in *Lowe* v. *Fairlie*, shews that Sir *Thomas Plumer* considered it by no means a matter of course to grant leave to amend. If it were necessary to dispose of the demurrer for want of equity, I should not do so without considering the case of *Adair* v. *Shaw*; but as I am of opinion that the demurrer for want of parties must be allowed, the only remaining question is, whether the Court ought in such a case as this, to assist the Plaintiff in prosecuting this suit by granting leave to amend. It is perfectly clear that, if this suit can ever be brought to an equitable adjudication, it must be prosecuted in the *East Indies*. The only actual defendant upon this record is the mere agent of Mrs. *Tyler*, the administratrix in *India* of the intestate, and the personal representative in *India* of her deceased husband. Mrs. *Tyler* and the other Defendant are in *India*; all the transactions, alleged in the bill to have taken place between the parties, took place in *India*; and considering it utterly impossible that this suit can be prosecuted fairly and equitably in this country, I do not think this is a case in which leave ought to be given to amend.

Demurrer for want of parties allowed accordingly.

Mr. *Tinney* applied, *pro formâ*, for leave to amend, which was refused.

The decision was appealed from, and the Lord Chancellor dismissed the appeal with costs. (*a*)

(*a*) 2 *Mylne & Craig*, 89.

AN

INDEX

TO

THE PRINCIPAL MATTERS.

ADMINISTRATION.

1. Though the distribution of an intestate's estate under a decree of the Court among persons found to be the next of kin, does not conclude the rights of persons who may have an equal or paramount title, yet the Court will not assist other next of kin who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims. *Sawyer* v. *Birchmore.* Page 391

On appeal, an inquiry was directed in the particular case whether the Plaintiffs were in fact some of the next of kin, and if so, whether they had notice of the suit in which the fund was distributed. *Sawyer* v. *Birchmore.* 825

AMENDMENT.

The 3 & 4 *W.* 4. *c.* 94. *s.* 13., giving jurisdiction to the Masters to hear and determine all applications for leave to amend bills, does not apply to cases where the party is entitled of course to leave to amend, as where leave is given at the hearing to amend by adding parties, or to cases where it is necessary for the Court to hear all the circumstances enabling it to determine whether leave ought to be given to amend, or not. *Rees* v. *Edwardes.* Page 465

See PARTIES, 2.

ANNUITY.

The Court will not give interest upon the arrears of an annuity, unless a special case be made. *Booth* v. *Leycester.* 247

ASSETS.

1. The Court will not marshal assets in favour of a charitable bequest given out of a mixed fund, whether the bequest be particular or residuary. *Hobson* v. *Blackburn.* Page 273

2. A testator, after commencing his will with words amounting to a charge of his real estate with the payment of his debts, devised an advowson to trustees upon trust to present his younger son to the living when vacant, and subject thereto in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his residuary real estate upon certain trusts to other trustees, and appointed three executors (who proved his will) one of whom was his younger son, and another one of the trustees of the advowson.

The personal estate being insufficient for the payment of his debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson, before any vacancy had occurred in the living.

In a suit for specific performance by the trustees of the advowson and executors, against the purchaser, it was held that, the charge being in effect a devise of the real estate in trust for the payment of debts, a good title could be made by the plaintiffs, without the institution of a suit to ascertain the deficiency of the personal estate, and that the purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money. *Shaw* v. *Borrer.* Page 559

ASSIGNMENT (EQUITABLE.)

The equitable assignee of an underlease is clothed with the obligation to perform the covenants in the underlease, though he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee as a ground for refusing the performance of a covenant in the original lease. *Jenkins* v. *Portman.* 435

BARON AND FEME.

1. A testator gave a legacy to a trustee in trust to invest it for the benefit of *E. S.*, independent of the control of her husband. On a bill by the husband and wife against the trustee, to have it declared that the wife was absolutely entitled to the fund, and to have the same transferred to her or to her husband, by her direction, or in her right, it was held, that the wife was entitled to the entire disposal of the fund, but that the husband could not obtain it in that suit, and it was referred to the Master to approve of a trustee, to whom the fund might be transferred

ferred upon the trust declared in the will, and to approve of a deed declaring that trust. *Simons* v. *Horwood.* Page 7

2. Where in a suit for the administration of a testatrix's estate, the Master's report was delayed in consequence of another pending suit, and it appeared upon the petition of one of the residuary legatees, an infant, and a married woman, that she had been deserted by her husband, and that there was likely to be a large residue, inquiries were directed to ascertain the facts stated in the petition, and the probable amount of the petitioner's fortune, and what would be a proper allowance for the past and future maintenance of the petitioner. *Coster* v. *Coster.* 199

3. A testator devised and bequeathed certain copyhold and leasehold estates to trustees, upon trust to pay the rents and profits to *M. A.* for her life to her separate use, and without power of anticipation; and a testatrix gave certain freehold estates to trustees in trust for the same *M. A.* for her life, to her separate use, and without power of anticipation.

M. A. was a *feme sole* at the date of the testator's will, and at his death. She was also a *feme sole* at the date of the testatrix's will, but she was married at the death of the testatrix.

M. A. joined with her husband in granting annuities to the plaintiff, charged upon the estates bequeathed by the testator, and the estates devised by the testatrix.

On the insolvency of the husband, a bill was filed by the Plaintiff to have the annuities paid out of the estates, and, upon motion for an injunction and receiver, the Court granted the motion as to the estates devised by the testator, but not as to those devised by the testatrix, on the ground that the rents of the former estates ought to be secured till the question in the cause could be determined, which could not be decided on an interlocutory motion. *Tullett* v. *Armstrong.* Page 429

4. A female infant, entitled to a legacy of stock, given in trust to be accumulated till she should attain twenty-one, and to be then transferred to her for her separate use, cannot transfer her interest in such legacy by the act of marriage to her husband; and, if married at the time when she attains her majority, she takes an absolute interest in the legacy for her separate use. *Johnson* v. *Johnson.* 648

BEQUEST FOR ROMAN CATHOLIC PRIEST.

A testatrix by her will, dated in the year 1680, gave to *C.* and his heirs a rent-charge issuing out of the lands therein described, and subject to the rent-charge, she gave the lands to *W.* and his heirs; and by a paper of instructions, reciting, that from the malignancy of the times she could not declare the

the uses to which she intended the rent-charge to be disposed, she gave the same to *C.* and his heirs upon the trusts thereinafter mentioned; and she requested and desired *W.* that a particular estate therein mentioned should always be let to farm to some deserving Catholic, qualified to entertain a priest for the help of poor Catholics, in the parishes therein specified; and she desired that a *Dominican* or *Franciscan* priest, if a priest of such order could be conveniently had, should be kept at the particular estate, and she gave 20*l.* per annum out of the rent-charge for the maintenance of such priest. The information was filed before the passing of the act 2 & 3 *W.* 4. *c.* 115.:

Held, that the direction in the paper of instructions was illegal and void, but given to a charitable purpose, and applicable therefore *cyprès* to a charitable purpose, to be determined by the sign manual of the Crown. *Attorney-General* v. *Todd.* Page 803

CHARGE.

Mortgagees, with notice of a specific charge for payment of debts upon devised estates, were held, notwithstanding releases of the executors to the devisees (such devisees being themselves two of the executors, and the releases not shewing that the charge had been raised and paid,) to be bound to see to the application of the mortgage-money. *Braithwaite* v. *Britain.* Page 206

2. Where introductory words in a will, directing payment of all the testator's just debts, were followed by specific devises to two of the executors; it was held, upon the whole context of the will, that the testator had not charged his real estate generally with the payment of debts. *Ibid.*

3. The testator commenced his will with the words, "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid." He then made several devises; and he gave to *J. G.* a small quantity of plate, together with the rents and profits of his freehold and leasehold premises due and accruing up to the quarter day next after his decease; which rents and profits he charged with the payment of his said debts, funeral expenses, and the charges of proving his will:

Held, that the testator had not charged his real estates generally with the payment of his debts. *Palmer* v. *Graves.* 545

CHARITY.

1. The principal charge in an information being, that certain alienations made by the trustees of the charity lands were not authorised by the inclosure act under which they purported to be made

made, and in particular that an improvident exchange had been made in order to favour one of the trustees; and it appearing that, although the directions of the inclosure act had not been strictly followed, nearly twenty years had elapsed since the transaction, and neither the exchange with the trustees nor any of the alienations were shewn to have been improvident or improper, the information was dismissed with costs as to that part of it; and the information, as it was framed, not appearing to have been filed with a view to the benefit of the charity, and having been instituted and conducted in a manner to create great unnecessary expense, no costs were given to the relators up to the hearing, as to that part of the information which was not dismissed. *Attorney-General* v. *Cullum*. Page 104

2. If a spiritual duty attached to the office of a corporator of a charitable corporation be not properly performed, the Court will not interfere, but application should be made to the visitor or the proper spiritual authorities.

The Court refused to direct an inquiry as to the propriety of granting leases of charity lands for lives, renewable upon a fine, at a small reserved rent, where there had been no alteration in the mode of letting the lands for upwards of 200 years. *Attorney-General* v. *Crook*. 121

3. A bequest of the residue of personal estate for such religious and charitable institutions and purposes within the kingdom of *England*, as in the opinion of the testator's trustees should be deemed fit and proper, is a good charitable bequest. *Baker* v. *Sutton*. Page 224

4. A bequest of money, directed to be laid out on mortgage security, at the highest interest that could be legally and safely obtained for the same, held to be void under the mortmain act. *Ibid.*

5. A direction to executors to purchase so much freehold land as could be bought for 100*l.* for a charitable purpose; and in case land could not be conveniently purchased within twelve months after the testator's decease, to pay 20*s.* per quarter for such charitable purpose, until such purchase could be made, does not give the executors such a discretion as to take the bequest out of the mortmain act. *Mann* v. *Burlington*. Page 235

6. The Court will not marshal assets in favour of a charitable bequest given out of a mixed fund, whether the bequest be particular or residuary. *Hobson* v. *Blackburn*. 273

7. In a charter incorporating a charitable foundation under the name of the master and five poor of the college or hospital therein described, it was provided that the master should perform certain ecclesiastical duties either by himself or by some sufficient minister or

or curate. The master of the hospital did not reside in or near the hospital, and a scheme had been approved, upon a reference, by which the master of the hospital was to allow a salary to a curate, who was to reside in the hospital:

Held, upon the construction of the whole charter, that the master was bound to reside in the hospital for the purpose of performing the several duties of his office.

Whether ecclesiastical duties enjoined under a charitable foundation are properly performed, it is not within the jurisdiction of the Court to determine, this being a matter which belongs to the cognisance of the ecclesiastical authorities. *Attorney-General* v. *Smithies.* Page 289

8. Where it appeared upon an information against the Fishmongers' Company, that the Company had omitted to invest a legacy, directed to be invested in land for the benefit of the charity, but had applied their own funds in aid of the charity to a larger amount than the investment would have produced; the Court held, that the neglect to invest the legacy, either in land or (if that could not be advantageously accomplished) in some separate fund, was a substantial ground of complaint, and directed accordingly such investment as appeared to be most beneficial to the charity, but refused any inquiry as to loss alleged, but not shewn to have been sustained by the neglect to invest. And, considering that the suit was not instituted for the benefit of the charity, the Court directed the Defendants to pay the costs as between party and party, and refused the relators their extra costs out of the charity fund. *Attorney-General* v. *Fishmongers' Company.* Page 492

9. Where the case charged in an information, praying for the regulation of a charity, was inconsistent with the true state of the case set forth in the answer, and the relator brought the information to a hearing without amendment, and with a prayer for relief, founded on the untrue statement, no application having been made to the Company, trustees of the charity, for the correction of the alleged abuse previously to the filing of the bill, the Court, although it was a case in which some relief might have been granted, if it had been properly brought before the Court, dismissed the information with costs. *Attorney-General* v. *The Grocers' Company.* 506

CONSTRUCTION OF STATUTES.

See STATUTES.

CONVEYANCE.

1. An infant tenant in tail may be ordered to convey under the 1 *W.* 4. *c.* 47. *s.* 11. *Radcliffe* v. *Eccles.* 130

2. Where

2. Where an infant heir is declared by the decree of the Court to be a trustee for the purchaser, the Court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary. *Miller* v. *Knight.* Page 129

CORPORATION.

See MUNICIPAL CORPORATION ACT.

COSTS.

1. The principal charge in an information being, that certain alienations made by the trustees of the charity lands were not authorised by the inclosure act under which they purported to be made, and in particular that an improvident exchange had been made in order to favour one of the trustees; and it appearing that, although the directions of the inclosure act had not been strictly followed, nearly twenty years had elapsed since the transaction, and neither the exchange with the trustees nor any of the alienations were shewn to have been improvident or improper, the information was dismissed with costs as to that part of it; and the information, as it was framed, not appearing to have been filed with a view to the benefit of the charity, and having been instituted and conducted in a manner to create great unnecessary expense, no costs were given to the relators up to the hearing, as to that part of the information which was not dismissed. *Attorney-General* v. *Cullum.* Page 104

2. It is not regular in a notice of motion for a four-day order to ask for the costs; but, if asked for, it is in the discretion of the Court to give or withhold them. *Peasnall* v. *Coultart.* 183

3. Where in a creditor's suit a fund had been realised by the diligence of the Plaintiff, and the assets were more than sufficient for payment of the debts, the costs of the Plaintiff, as between party and party, were ordered to be paid out of the general fund, and the extra costs of the Plaintiff were, under the circumstances, directed to be paid *pro ratâ* by all the creditors who partook of the benefit of the suit. *Stanton* v. *Hatfield.* Page 358

4. The general personal estate of a testator is liable to all costs occasioned by his mistake, or rendered necessary for the purpose of obtaining the opinion of the Court on the construction of his will, though some of those costs may have been incurred in proceedings affecting the real estate only, and the result of which was to benefit a devisee of the real estate. *Ripley* v. *Moysey.* 578

5. The Court will not allow costs to a trustee who, after having acted, declines to perform the trusts reposed in him, and thereby renders a suit for the appointment of a new trustee necessary. *Howard* v. *Rhodes.* 581

COUNSEL.

COVENANT.

The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, though he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee as a ground for refusing the performance of a covenant in the original lease. *Jenkins* v. *Portman.*

Page 435

COVENANT TO STAND SEISED.

F. B. by indentures of lease and release, in consideration of natural love and affection for his sisters, and a nominal consideration, released a particular freehold estate to *B.*, his heirs and assigns; and he assigned a particular leasehold estate, and all other the property in *Great Britain* or *Ireland*, whether real or personal, which he might be entitled to at the time of executing the indenture to *B.*, his executors, administrators, and assigns, upon trust, that *B.*, his heirs, executors, administrators, and assigns, should stand possessed thereof upon trust to pay the rent, interest, dividends, or annual produce arising therefrom, or the monies arising from the sale thereof, equally between his three sisters. *F. B.* was, at the date of this indenture and of his death, seised of a share in a freehold house situate in *King Street*, not mentioned in the lease or release:

Held, that the release could not operate as a covenant to stand seised of the house in *King Street*, there being in the release no mention of that house, and the general words being, from the frame of the deed, applicable only to leasehold or other personal estate.

Whether an instrument, defective as a release or other assurance, can operate in equity as a covenant to stand seised, where the covenantee is a stranger in respect of blood or marriage to the covenantor, but connected by blood or marriage with the person for whose use the covenant to stand seised is made, *quære.* *Doungsworth* v. *Blair.* Page 795

CREDITOR'S SUIT.

Where in a creditor's suit a fund had been realised by the diligence of the Plaintiff, and the assets were more than sufficient for payment of the debts, the costs of the Plaintiff, as between party and party, were ordered to be paid out of the general fund, and the extra costs of the Plaintiff were, under the circumstances, directed to be paid *pro ratâ* by all the creditors who partook of the benefit of the suit. *Stanton* v. *Hatfield.* 358

DECREE.

A declaration, being the act of the Court, cannot be introduced into a decree taken by the Plaintiff in the absence of the Defendant, which decree must be such as the Plaintiff can abide by at his own peril.

In a creditor's suit the Defendant did not appear at the hearing, and the counsel for the Plaintiff introduced into the minutes of the decree a declaration, that the Defendant had notice of the Plaintiff's bond, which was admitted by the answer. The declaration was irregular, the Plaintiff being entitled only to the common decree in a creditor's suit. *Jennings* v. *Simpson.* Page 404

DEMURRER.

1. A bill of revivor cannot be demurred to for want of a party who was not before the Court at the time of the abatement, although the suit might have been imperfect without such party, for it is not the office of a demurrer to a bill of revivor to correct such imperfection. *Metcalfe* v. *Metcalfe.* 74

2. A demurrer to a bill, on the ground that the Plaintiff has not taken out a prerogative administration, cannot be sustained. *Ibid.*

3. Demurrer to a bill for discovery in aid of an action brought by the Plaintiff to recover damages for an assault and false imprisonment, allowed, the whole object of the bill being to obtain a discovery of matters which, if established, would have subjected the Defendant to penal consequences.

The whole object of a bill of discovery being criminatory, a general demurrer does not cover too much, because some of the interrogatories, separately considered, may relate to matters not directly criminatory.

Semble, that a bill of discovery in aid of an action for a mere personal *tort* cannot be sustained. *Glynn* v. *Houston.* Page 329

4. A defence, though in words applied to only one part of the bill, if it should, on the face of it, be applicable to the whole bill, cannot stand in conjunction with another distinct defence which is applicable and applied to another distinct part of the bill.

The Defendant to part of the bill put in a plea, that there were no outstanding terms, and a demurrer to the rest, that the Plaintiff had no title: Held, that the plea was good, but that the demurrer, being applicable to the whole of the bill, and consequently to that part of it which was covered by the plea, was bad. But the Defendant, having also demurred *ore tenus* for want of equity, and the Court being of opinion that the Plaintiff was not entitled to the discovery and relief sought by the bill, that demurrer was allowed. *Crouch* v. *Hickin.* 385

DIS-

DISCOVERY.

1. Plea to a bill for discovery, filed after a demurrer to a plea at law, allowed. *Stewart* v. *Lord Nugent.* Page 201

2. Demurrer to a bill for discovery in aid of an action brought by the Plaintiff to recover damages for an assault and false imprisonment, allowed, the whole object of the bill being to obtain a discovery of matters, which, if established, would have subjected the Defendant to penal consequences.

The whole object of a bill of discovery being criminatory, a general demurrer does not cover too much, because some of the interrogatories, separately considered, may relate to matters not directly criminatory.

Semble, that a bill of discovery in aid of an action for a mere personal *tort* cannot be sustained. *Glynn* v. *Houston.* 329

DISMISSAL OF BILL.

A Plaintiff cannot, as of course, obtain an order to dismiss his bill upon payment of costs, where such dismissal may prejudice the Defendant; and where a Plaintiff in a cross suit obtained an order, as of course, to dismiss his bill, after the original bill and the cross bill had been set down to be heard together, the order was held to be irregular. *Booth* v. *Leycester.* 247

DOUBLE PROVISION.

A. having invested in stock a sum of money, in pursuance of a settlement, by way of portion for one of his daughters, and having given a bond for the payment of a further sum at his decease, entered into an agreement with *B.* to make a provision for his unmarried daughter, on her marriage with *B.*, on a basis of equality with the provision made for his married daughter. A memorandum of the terms of the agreement (in which some variations were afterwards made by the parties) was written at the direction of *A.*, by *A.*'s solicitor, in the presence and with the approbation of *B.*; and *A.* gave instructions to his solicitor to prepare a settlement in conformity with the memorandum, subject to the variations, but he died before such settlement was executed, having made a will, by which he gave a share of the residue of his estate to his married daughter.

B. married the daughter of the testator, and performed his part of the agreement comprised in the memorandum; and on a bill filed by him and his wife, claiming the portion agreed to be settled against the testator's estate, it was held, first, that the memorandum was not a binding agreement within the statute of frauds; secondly, that the share of the residue, given by the will to the daughter married in the testator's lifetime, was

was a satisfaction of that part of her portion which was secured by bond. *The Earl of Glengal* v. *Barnard.* Page 769

DOWER.

1. A testator devised all and singular the rents, issues, and profits of his copyhold lands, to be applied to the maintenance of his children, until the youngest should have attained twenty-one, subject in the meantime and charged with an annuity to his wife, so long as she should continue his widow, and upon his youngest child attaining twenty-one, he devised all and singular his said copyhold lands among all his children equally; and he devised all and singular his freehold tithes and lands upon the same trusts as he had declared respecting his copyhold estates, subject to the annuity to his wife; and he bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow:

Held, that the widow was entitled both to the benefits given by the will and to her dower. *Dowson* v. *Bell.* 761

2. A testator gave all his farms, lands, estates, and hereditaments, and all other his real estate, upon trust to receive the rents and profits, and pay to his wife during her life, in case she should continue his widow, the sum of 200*l.*; and out of the same rents and profits, to maintain and educate his son during his minority, and to place the surplus of the same rents and profits out at interest till his son should attain twenty-one, and when his son should attain twenty-one, to pay him the accumulations, and let him into possession of all his said real estates, lands, and hereditaments, subject to the annuity to the widow:

Held, that the testator's widow was entitled both to the annuity and to her dower out of the devised estates. *Harrison* v. *Harrison.* Page 765

EQUITABLE MORTGAGE.

A. made an equitable mortgage of certain premises to *B.*, and he afterwards entered into an agreement to grant a lease of the premises to *C.*, who had notice of the prior charge. *A.* became bankrupt before the lease was executed, and, on the petition of *B.*, an order in bankruptcy was made, under which the premises were sold, and *B.* became the purchaser, and retained the amount of his equitable mortgage out of the purchase-money:

Held, on a bill filed by *C.* for specific performance of the agreement, that *B.* having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement. *Smith* v. *Phillips.* 694

EVIDENCE.

A testator bequeathed the residue of his estate to his wife *A. G.* for her life, and the legatee, describing herself as *A. G.* widow, filed a bill against the executors for the administration of the estate; but, it appearing that *J. P.*, the first husband of the legatee, was living at the time the ceremony of marriage was performed between her and the testator, and at the time of filing the bill, she filed a supplemental bill, describing herself as *A. P. alias A. G.*, by her next friend, against *J. P.*, for the purpose of making her husband a party to the suit:

Held, that this was not such an alteration of the frame of the record as to render the evidence taken in the first cause inadmissible at the hearing of the two causes; and that the amended description of the Plaintiff in the supplemental bill could not affect the liability of a witness examined in the original suit to be indicted for perjury, if he swore falsely. *Giles* v. *Giles*. Page 685

EXAMINATION.

An order to examine a co-defendant as a witness, may be obtained *ex parte* by a Defendant, as well after as before decree.

The Court gives credit to the allegation upon which the order is founded, that the Defendant proposed to be examined is not interested; and the question, whether he is or is not interested, can only be raised, when the deposition of the witness is objected to. *Paris* v. *Hughes*. Page 1

EXCHANGE.

An exchange of lands, or an exchange of lands where a sum of money forms part of the consideration by way of equality of exchange, is not within the 1 *W.* 4. *c.* 60. *Turner* v. *Edgell.*, 502

EXECUTORY DEVISE.

Devise of freehold and leasehold estate to *A.* and *B.* as tenants in common, and the heirs of the body and bodies of the said *A.* and *B.* as tenants in common, and if either of them should die without leaving issue, then as to the share of such of them as should so die without issue as aforesaid, to the use of the survivor of them, the said *A.* and *B.*, and the heirs of his body. And in case both of them should die without issue of his or their body or bodies, then to the use of *C.* for life, with remainder to the trustees to preserve, &c., and divers remainders over:

Held, that the limitation to the survivor was a good limitation by way of executory devise; that by the word "issue" in the succeeding clause, the testator intended such issue as were to take under the prior limitation, and that consequently the limitation over to *C.* was

was not too remote. *Radford* v. *Radford* Page 486

FAMILY ARRANGEMENT.

A. and *B.*, having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, *A.*, the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands. *A.* was, in fact, at the time of this agreement, tenant in tail under the limitations of a surrender made by his grandfather; and, after *A*'s death without issue, *B.*, having discovered his own title as tenant in tail, repudiated the agreement, and brought an action of ejectment to recover the whole estate.

On a bill filed by the devisee of *A.*, the Court, upon the principle on which it supports family arrangements, decreed *B.* to do all necessary acts to bar the entail, and vest the parts of the lands, allotted under the agreement to *A.*, upon the trusts of *A*'s will. *Neale* v. *Neale.* 672

FELONY.

See FORFEITURE.

FORFEITURE.

Where a legacy was given to a person when he should attain the age of twenty-one, and if he should die under that age without issue, over; and the legatee committed a felony, and underwent the punishment to which he was sentenced for the offence before he attained twenty-one, which punishment, by the 9 *G.* 4. *c.* 32. *s.* 3., operates as a pardon, and restores the felon to his civil rights; it was held that the legatee, upon attaining twenty-one was entitled to the legacy. *Stokes* v. *Holden.* Page 145

FRAUD.

A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights. *Giles* v. *Giles.* 685

HEIR.

Mortgagees and the heirs of mortgagees are within the meaning of the eighth section of the 1 *W.* 4. *c.* 60.,

c. 60., explained by the 4 & 5 *W.* 4. *c.* 23. *s.* 2. *Ex parte Whitton.* Page 278

IMPLICATION.

The word "family," admits of a variety of applications, and the construction to be put upon it in a particular will must depend upon the intention of the testator, to be collected from the whole context of the will.

Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust that at his wife's decease the whole of it, as well freehold as personal, should be equally divided among his children; it was held, that the testator, in the words "my family," intended to comprise his wife; and as to the testator's property devised after his wife's decease to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication, as well in the real as in the personal estate.

As to the effect of a devise to the heir and another person, or to the heir and other persons on the death of *A.*, where there is no explanatory context, *quære. Blackwell* v. *Bull.* 176

INFANT.

1. Where an infant heir is declared by the decree of the Court to be a trustee for a purchaser, the Court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary. *Miller* v. *Knight.* Page 129

2. The Court will not compel the next friend of an infant, on the ground of poverty, to give security for costs. *Fellows* v. *Barrett.* 119

INSOLVENT.

1. Principles upon which the meaning of the term "insolvent," in the 46 *G.* 3. *c.* 135. *s.* 1. is to be determined. Embarrassment is not to be confounded with insolvency; but where a man's means of present payment are so crippled, and his embarrassment is so great that he cannot proceed with and carry on his business in the usual course of trade, he is insolvent, without reference to the consideration whether the whole of his property when converted into money and realised would be sufficient to pay his debts; and notice of such a state of circumstances is notice of insolvency. *De Tastet* v. *Le Tavernier.* 161

2. Insolvency is a ground upon which the Court will refuse specific performance of an agreement to grant a lease, but there must be proof of general insolvency, and a particular default in the payment of rent to the landlord of the premises, last occupied by the person contracting for the lease, will not dis-

disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility. *Neale* v. *Mackenzie.* Page 473

INTEREST.

1. By a deed between a father and son, reciting that the father was desirous of settling the property therein comprised, so as to make the same a provision for himself during his life, and for his wife and her children by him after his decease, he assigned the same and every part thereof to their son, upon the trusts thereinafter mentioned concerning the same. The father proceeded to declare the trusts as to part of his property in favour of his wife, a daughter, and a niece, but no trust was declared as to the surplus: Held, that the surplus did not result to the grantor, but belonged to the son; and, the father having been maintained by the son for fifteen years, a bill filed after the son's death by the father, and revived upon the father's death by his representative, was dismissed with costs as to that part of it which sought an account of interest. *Cook* v. *Hutchinson.* 42

2. The Court will not give interest upon the arrears of an annuity, unless a special case be made. *Booth* v. *Leycester.* 247

3. Interest at 4 per cent. ordered to be paid upon a debt, not in its nature bearing interest, vexatiously withheld by a husband from the executor of his deceased wife. *Meredith* v. *Bowen.* Page 270

4. The testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one, and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein-mentioned:

Held, that the grandchildren were entitled to the interest during their minority. *Boddy* v. *Dawes* 362

5. The testator devised and bequeathed the residue of his estate and effects real and personal to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to *M. S.* for her life, and after her decease to pay and transfer such residue in equal moieties to the persons therein mentioned:

Held, that the tenant for life was entitled to the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as should elapse before the conversion of the residue according to the direction of the will. *Douglas* v. *Congreve* 410

 6. Where

6. Where the amount of principal and interest due upon a mortgage has been found by the Master's report, the rule now is to compute subsequent interest upon the principal only; and the time for payment of the money found due upon a mortgage is enlarged upon the terms of paying the interest and costs found due. *Whatton* v. *Cradock*. Page 267

JOINT-STOCK COMPANY.

In a suit for the purpose of having the affairs of a dissolved joint-stock company settled, and wound up under a decree of the Court, and praying for accounts of the partnership transactions, and that a sale of the partnership property by the directors might be declared fraudulent and void; all the members of the company, however numerous, must be parties to the suit. *Evans* v. *Stokes*. 23

JUDGMENT.

Motion to restrain a creditor, after a decree, from issuing execution on a judgment obtained before the decree *de bonis testatoris, et si non, de bonis propriis* as to costs, refused under the circumstances.

Principles upon which the Court acts in restraining proceedings at law, after a decree, with reference to the priority of the decree or judgment at law, and other circumstances. *Lee* v. *Park*. 714

JURISDICTION.

1. In a charter incorporating a charitable foundation under the name of the master and five poor of the college or hospital therein described, it was provided that the master should perform certain ecclesiastical duties either by himself or by some sufficient minister or curate. The master of the hospital did not reside in or near the hospital, and a scheme had been approved, upon a reference, by which the master of the hospital was to allow a salary to a curate, who was to reside in the hospital.

Held, upon the construction of the whole charter, that the master was bound to reside in the hospital for the purpose of peforming the several duties of his office.

Whether ecclesiastical duties enjoined under a charitable foundation are properly performed, it is not within the jurisdiction of the Court to determine, this being a matter which belongs to the cognisance of the ecclesiastical authorities. *Attorney-General* v. *Smithies*. Page 289

2. The 3 & 4. *W*. 4. *c*. 94. *s*. 13., giving jurisdiction to the Masters to hear and determine all applications for leave to amend bills, does not apply to cases where the party is entitled of course to leave to amend, as where leave is given at the hearing to amend by adding parties, or to cases where it is neces-

necessary for the Court to hear all the circumstances enabling it to determine whether leave ought to be given to amend, or not. *Rees* v. *Edwardes*. Page 465

3. An injunction was granted to restrain the Plaintiff from prosecuting a suit not brought to a hearing in *Ireland*, the subject matter of the suit being the same as that of a suit instituted in this Court, and in which this Court had pronounced a decree, refusing the relief sought by Plaintiff. *Booth* v. *Leycester*. 579

LEASE.

1. If a spiritual duty attached to the office of a corporator of a charitable corporation be not properly performed, the Court will not interfere, but application should be made to the visitor or the proper spiritual authorities.

The Court refused to direct an inquiry as to the propriety of granting leases of charity lands for lives, renewable upon a fine, at a small reserved rent, where there had been no alteration in the mode of letting the lands for upwards of 200 years. *Attorney-General* v. *Crook*. 121

2. The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, though he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee as a ground for refusing the performance of a covenant in the original lease. *Jenkins* v. *Portman*. Page 435

3. Insolvency is a ground upon which the Court will refuse specific performance of an agreement to grant a lease; but there must be proof of general insolvency, and a particular default in the payment of rent to the landlord of the premises, last occupied by the person contracting for the lease, will not disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility. *Neale* v. *Mackenzie*. 743

LEGACY.

A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless, the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights. *Giles* v. *Giles*. 685

MAINTENANCE.

1. The testator gave legacies out of a sum of stock to the grandchildren

named in his will on their attaining the age of twenty-one, and if any of them should die under twenty-one their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned:

Held, that the grandchildren were entitled to the interest during their minority. *Boddy* v. *Dawes.* Page 362

2. It appearing that an infant ward of the Court had been sent abroad in consequence of the advice of medical men that the infant's removal to a milder climate was necessary for his health, the Court granted a reference to approve of a plan for the infant's maintenance and education out of the jurisdiction, but limited the allowance to be made to one year. *Wyndham* v. *Lord Ennismore.* 467

MARRIED WOMAN.

Where in a suit for the administration of a testatrix's estate, the Master's report was delayed in consequence of another pending suit, and it appeared upon the petition of one of the residuary legatees, an infant, and a married woman, that she had been deserted by her husband, and that there was likely to be a large residue, inquiries were directed to ascertain the facts stated in the petition, and the probable amount of the petitioner's fortune, and what would be a proper allowance for the past and future maintenance of the petitioner. *Coster* v. *Coster.* Page 199

MARSHALLING OF ASSETS.

1. The Court will not marshal assets in favour of a charitable bequest given out of a mixed fund, whether the bequest be particular or residuary. *Hobson* v. *Blackburn.* 273

MASTER (JURISDICTION OF).

The 3 & 4 *W.* *c.* 94. *s.* 13., giving jurisdiction to the Masters to hear and determine all applications for leave to amend bills, does not apply to cases where the party is entitled of course to leave to amend, as where leave is given at the hearing to amend by adding parties, or to cases where it is necessary for the Court to hear all the circumstances enabling it to determine whether leave ought to be given to amend, or not. *Rees* v. *Edwardes.* 465

The Master has no authority under the 3 & 4 *W.* 4. *c.* 94. *s.* 13., to entertain an application for enlarging publication, in the sense of an application for leave to examine witnesses after the depositions on one side have been delivered out, the words "enlarging publication" in that section being restricted to en-

enlarging the time at which publication is to pass. *Carr* v. *Appleyard.* Page 725

MISJOINDER.

Where a mere formal party, having no interest in the suit, was joined as a co-plaintiff with the parties having a beneficial interest; it was held, that an objection, not raised by the answer, on the ground of misjoinder, could not prevail at the hearing. *Raffety* v. *King.* 602

MORTGAGE.

1. Where a deposit of a deed was made to secure a debt, and from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mortgagor, on a bill filed by the equitable mortgagee to have the estate sold, is entitled to the usual time to redeem. *Mellor* v. *Woods.* 16

2. Where one transaction is closely followed by, and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction, by which the rule, that notice to the solicitor is notice to the client, has been restricted to the same transaction. *Hargreaves* v. *Rothwell.* 154

3. Where the amount of principal and interest due upon a mortgage has been found by the Master's report, the rule now is to compute subsequent interest upon the principal only; and the time for payment of the money found due upon a mortgage is enlarged upon the terms of paying the interest and costs found due. *Whatton* v. *Cradock.* Page 267

MORTGAGEE.

1. Mortgagees and the heirs of mortgagees are within the meaning of the eighth section of the 1 *W.* 4. *c.* 60., explained by the 4 & 5 *W.* 4. *c.* 23. *s.* 2. *Ex parte Whilton.* 278

2. If the mortgagee enters into possession in his character of mortgagee, or by virtue of his mortgage title alone, he is for the period of twenty years liable to account, and, if payment be tendered to him, liable to become trustee for the mortgagor; but, if the mortgagor permits the mortgagee to hold for twenty years without accounting, or admitting his mortgage title, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it was previously at law; and, in such a case, the time runs against the mortgagor from the moment the mortgagee takes possession, and continues to run against all those claiming under the mortgagor, whatever may be the disabilities to which they may be subjected.

But if the mortgagee enters, not in his character of mortgagee only,

only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and the validity of the conveyance he takes; and if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mortgagor and mortgagee, to keep down the interest of the mortgage for the benefit of the person or persons entitled in remainder, and time will not run against the remaindermen during the continuance of the estate for life. *Raffety* v. *King*. Page 602

MORTMAIN.

1. A bequest of the residue of personal estate for such religious and charitable institutions and purposes within the kingdom of *England*, as in the opinion of the testator's trustees should be deemed fit and proper, is a good charitable bequest. *Baker* v. *Sutton*. 224
2. A bequest of money, directed to be laid out on mortgage security, at the highest interest that could be legally and safely obtained for the same, held to be void under the mortmain act. *Ibid.*
3. A direction to executors to purchase so much freehold land as could be bought for 100*l.* for a charitable purpose; and in case land could not be conveniently purchased within twelve months after the testator's decease, to pay 20*s.* per quarter for such charitable purpose, until such purchase could be made, does not give the executors such a discretion as to take the bequest out of the mortmain act. *Mann* v. *Burlington*. Page 235

MUNICIPAL CORPORATIO ACT.

1. Demurrer allowed to an information filed for the purpose of setting aside a mortgage, and appropriation of the money thereby raised to the endowment of the clergy of *Liverpool*, made by the old council of the town of *Liverpool*, in the interval between the passing of the Municipal Corporation Act and the election of the new council, there being no allegation in the information of fraud, collusion, or improvidence, the new council having refused to take any proceedings for the purpose of calling in question the acts of their predecessors, and the application of the property for the more secure endowment of the members of the Established Church, not appearing to the Court to be other than an application, which, under the circumstances, must legally be considered as beneficial to the inhabitants of the borough. *Attorney-General* v. *Aspinall*. 513
2. Demurrer to an information against the corporation of *Norwich*, praying for an injunction to restrain certain applications of the city

city fund of the borough and city of *Norwich*, which, as the information alleged, were intended to be made in violation of the Municipal Corporation Act, 5 & 6 *W.* 4. *c.* 76., allowed under the circumstances.

Whether the Court has jurisdiction, notwithstanding the provisions of the Municipal Corporation Act, to restrain misapplications of the borough fund of a corporation, *quære.*

In the ordinary management of the borough fund a court of equity ought not to interfere; but in a case of misapplication calling for a specific remedy, *semble*, that the jurisdiction of the Court is not excluded by the Municipal Corporation Act. *Attorney-General* v. *The Corporation of Norwich.* Page 700

NEW ORDERS.

1. Where a Plaintiff obtains an order for a commission to examine witnesses, and serves it on the Defendant, his subsequent abandonment of such order will not withdraw the case from the operation of the seventeenth new order of 1831. *Rayson* v. *Lees.* 14
2. A bond in the increased penalty of 100*l.*, as required by the 40th of the New Orders, is to be given in all cases where security for costs is required by the Court. *Bailey* v. *Gundry.* 53
3. Under the tenth of the New Orders of *December* 1833, the common injunction may be obtained on any day out of term to which the seal may be adjourned. *Brierley* v. *Walmsley.* Page 141
4. Where the Defendant had neglected to take advantage of the default of the Plaintiff, until the Plaintiff served a *subpœna* to rejoin, and sued out a commission, and the Defendant moved to dismiss the bill for want of prosecution on affidavit that the cause was not set down for hearing, and that no rules were taken out to produce witnesses, or pass publication; the case was held to be within the seventeenth New Order of 1831, and the Plaintiff was ordered to speed the cause, but the Defendant was not allowed costs of the application. *White* v. *Smith.* 381
5. Under the eighty-second of the amended New Orders, a cause may be set down for hearing in the cause-paper for the same term in which publication has passed. *Turner* v. *Hitchon.* 814

NEXT FRIEND.

The Court will not compel the next friend of an infant, on the ground of poverty, to give security for costs. *Fellows* v. *Barrett.* 119

NEXT OF KIN.

Though the distribution of an intestate's estate under a decree of the Court among persons found to be the next of kin, does not conclude the rights of persons who may have

have an equal or paramount title, yet the Court will not assist other next of kin who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims. *Sawyer* v. *Birchmore*. Page 391

2. On appeal an inquiry in the particular case was directed, whether the Plaintiffs were in fact, as they claimed to be, some of the kin; and if so, whether they had notice. *Ibid.* 824

NOTICE.

1. Where one transaction is closely followed by, and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction, by which the rule, that notice to the solicitor is notice to the client, has been restricted to the same transaction. *Hargreaves* v. *Rothwell*. 154

2. *A.* by deed assigned certain sums represented by a fund in Court to *B.*, in trust, to apply the same in payment and discharge of money then due from *A.* to *B.*, and in further payment of all and every the sums of money which *B.* might advance to *A.*: and, subject thereto, in trust for *A.* *A.* died indebted to *B.* in the sum of 3000*l.* due at the date of the assignment, and also largely indebted to the Crown. *A.* was further indebted to a banking firm, of which *B.* was a partner, in a sum which was treated by the partnership as a bad debt, and in respect of which *B.*'s share of the loss amounted to 3914*l.*; and a further sum of 2313*l.* was paid after the death of *B.* by his executor to the Crown, upon process being issued against the estate of *B.*, who had been a surety to the Crown for *A.*

The Crown claimed priority as to the whole fund in Court, insisting that the property comprised in the deed consisted of *choses in action*, and that no notice had been given to the trustees of the fund.

Held, that the estate of *B.* was entitled to the benefit of the deed in respect of the sum due at the date of it, and the sum paid by *A.*'s executor, but not to the sum representing *B.*'s share of the loss in the partnership transaction. *Foster* v. *Hargreaves*. Page 283

OFFICER OF THE COURT.

Where an irregularity has been committed by an officer of the Court in executing its process, the Court will not permit a party to proceed in an action at law against its officer, but will refer it to the Master in a proper case, to settle a compensation.

Where, from the circumstances, it appeared impossible to make out a case for damages, the Court granted an injunction to restrain a party from proceeding in an action of trespass brought against the mes-

messenger of the Court, and ordered the Plaintiff at law to pay the costs of the application. *Chalie* v. *Pickering*. Page 749

PAROL EVIDENCE.

Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property, in which she had only a life-interest, to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election; such evidence was held to be inadmissible. *Clementson* v. *Gandy*. 309

PARTIAL INSANITY.

Where sanity is impeached, and the evidence is conflicting, the question is not whether the facts adduced in support of it are not in general indications of sanity, but whether they are inconsistent with or sufficiently explanatory of the indications of insanity produced on the other side, on which undoubtedly the *onus* lies.

A testator gave to his niece all his bond-debts, and he gave to *C.*, a person in whom he reposed great confidence, besides other benefits, all the residue of his property. Four months after the date of the will the testator took from a bond-debtor a conveyance of an estate to himself for life, with remainder to *C.* in fee, and the bond was delivered up to be cancelled. *C.* took a part in promoting this transaction, but no direct fraud was established against him, and it did not appear that he exercised any positive control over the testator. Two days afterwards the testator committed suicide. The evidence as to the soundness of the testator's mind was conflicting, many acts consistent with sanity having been done by him up to the time of his death; but the Court being of opinion, upon the whole evidence, that the testator, at the time of purchasing the estate in exchange for the bond, was of unsound mind: and considering the state of his mind in connection with the confidence which he placed in *C.*, without directing an issue, set aside the conveyance, and declared the testator's niece entitled to the benefit of the bond. *Steed* v. *Calley*. Page 620

PARTIES.

1. In a suit for the purpose of having the affairs of a dissolved joint-stock company settled, and wound up under a decree of the Court, and praying for accounts of the partnership transactions, and that a sale of the partnership property by the directors might be declared fraud-

fraudulent and void; all the members of the company, however numerous, must be parties to the suit. *Evans* v. *Stokes.* Page 23

2. When a demurrer for want of parties is allowed, though, in ordinary cases, the Court gives leave to amend by adding parties, it is in the discretion of the Court to grant or refuse such leave; and where the suit was so framed that it could not be prosecuted for any beneficial purpose in this country, leave to amend was refused. *Tyler* v. *Bell.* 825

PARTNER.

The claim of a creditor against the assets of a deceased partner was held not to be barred, under the circumstances, by the statute of limitations. *Braithwaite* v. *Britain.* 206

PLEA.

1. The bill was filed for an account by Plaintiffs, claiming to be entitled to the equity of redemption of certain estates in the island of *St. Christopher* against the Defendants, as mortgagees. The Defendants pleaded, that they were owners of the estate in question under a bill of sale, which, according to the laws of the island of *St. Christopher*, vested the absolute interest in the premises in the Defendants.

The bill charged, that the Defendants, shortly after the death of the testator under whom the Plaintiffs claimed, entered into possession or receipt of the rents and profits of the estates in question. The Defendants, by their plea, stated, that they entered into possession or receipt of the rents and profits after, and not before, the sale. This allegation of the Defendants did not over-rule the plea. *Verchild* v. *Paull.* Page 87

2. Leave to plead double, granted.

Principles upon which the Court proceeds in allowing double pleas. *Kay* v. *Marshall.* 190

3. Plea to a bill for discovery, filed after a demurrer to a plea at law, allowed. *Stewart* v. *Lord Nugent.* 201

PLEADING.

1. A bill of revivor cannot be demurred to for want of a party who was not before the Court at the time of the abatement, although the suit might have been imperfect without such party, for it is not the office of a demurrer to a bill of revivor to correct such imperfection. *Metcalfe* v. *Metcalfe.* 74

2. A defence, though in words applied to only one part of the bill, if it should, on the face of it, be applicable to the whole bill, cannot stand in conjunction with another distinct defence which is applicable and applied to another distinct part of the bill.

The Defendant to part of the bill put in a plea, that there were no outstanding terms, and a demurrer to the rest that the Plaintiff

tiff had no title: Held, that the plea was good; but that the demurrer, being applicable to the whole of the bill, and consequently to that part of it which was covered by the plea, was bad. But the Defendant having also demurred *ore tenus* for want of equity, and the Court being of opinion that the Plaintiff was not entitled to the discovery and relief sought by the bill, that demurrer was allowed. *Crouch* v. *Hickin.* Page 385

3. Where a mere formal party, having no interest in the suit, was joined as a co-plaintiff with the parties having a beneficial interest; it was held, that an objection, not raised by the answer, on the ground of misjoinder, could not prevail at the hearing. *Raffety* v. *King.* 602

POWER.

A testatrix having, under the will of her mother, a power of appointing by will to a sum of 2000*l.*, and also an interest in the residue of her mother's personal estate, gave legacies of 1000*l.*, 500*l.*, and 500*l.* She then gave 21*l.* to each of her executors; and proceeded as follows: — "Forasmuch as the amount of my property is not yet ascertained, the same awaiting the settling of my late mother's affairs, my will is, that, if my money and personal estate should not be sufficient to pay the said legacies in full, the legatees shall make an abatement. She then disposed of her furniture, plate, &c., and of the residue of her money and personal estate:

Held, that the testatrix's will was not an execution of her power. *Buxton* v. *Buxton.* Page 753

PRACTICE.

1. An order to examine a co-defendant as a witness, may be obtained *ex parte* by a Defendant, as well after as before decree.

The Court gives credit to the allegation upon which the order is founded, that the Defendant proposed to be examined is not interested; and the question, whether he is or is not interested, can only be raised, when the deposition of the witness is objected to. *Paris* v. *Hughes.* 1

2. A Defendant cannot file a demurrer to part of the bill, and an answer to the remainder upon a common *dedimus*, but must sue out a special *dedimus* for that purpose. *Tomlinson* v. *Swinnerton.* 9

3. Where a Plaintiff obtains an order for a commission to examine witnesses, and serves it on the Defendant, his subsequent abandonment of such order will not withdraw the case from the operation of the seventeenth new order of 1831. *Rayson* v. *Lees.* 14

4. Upon a *subpœna*, issued for the costs of a Defendant against whom the bill had been dismissed, the Plaintiff could not be found at the

the place where she was described as residing in the bill, and no information as to her place of residence could be obtained from her solicitor.

On a motion made on the part of the Defendants who continued on the record, and who were threatened by the Plaintiff's solicitor with an attachment for want of an answer to the amended bill, the Plaintiff was ordered to find security for costs. *Bailey* v. *Gundry.* Page 53

5. It is not regular in a notice of motion for a four-day order to ask for the costs; but, if asked for, it is in the discretion of the Court to give or withhold them. *Peasnall* v. *Coultart.* 183

6. A Plaintiff cannot, as of course, obtain an order, to dismiss his bill upon payment of costs, where such dismissal may prejudice the Defendant; and where a Plaintiff in a cross suit obtained an order, as of course, to dismiss his bill, after the original bill and the cross bill had been set down to be heard together; the order was held to be irregular. *Booth* v. *Leycester.* 247

7. The Plaintiff, upon motion to dismiss his bill for want of prosecution, undertook to speed, and in pursuance of the undertaking filed a replication, and served a *subpœna* to rejoin; but he did not move for a commission to examine witnesses. The Defendant afterwards moved to dismiss for want of prosecution. The motion was dismissed with costs, on the ground, that after the *subpœna* to rejoin, the Plaintiff not requiring a commission, the Defendant might himself proceed with the cause. *Carden* v. *Manning.* Page 380

8. Where the Defendant had neglected to take advantage of the default of the Plaintiff, until the Plaintiff served a *subpœna* to rejoin, and sued out a commission, and the Defendant moved to dismiss the bill for want of prosecution on affidavit that the cause was not set down for hearing, and that no rules were taken out to produce witnesses, or pass publication; the case was held to be within the seventeenth New Order of 1831, and the Plaintiff was ordered to speed the cause, but the Defendant was not allowed costs of the application. *White* v. *Smith.* 381

9. Where the Defendant had presented a petition to the Lord Chancellor to have a demurrer set down to be heard before the Vice-Chancellor, and before the order was obtained upon it, the Plaintiff, who knew of the application made by the Defendant, presented a petition to the Master of the Rolls to have the demurrer heard in this Court, and obtained an order upon that petition, the Plaintiff was held to be entitled to his order. *Marr* v. *Williams* 582

10. An order *nisi* to dissolve an injunction, after publication of evidence in the cause, is irregular. *Barnett* v. *Mole.* 645

11. A special application on the part of the Defendant to have a cause advanced and heard as a short cause, will be granted, unless the counsel for the Plaintiff will undertake to say that the cause is not a proper one to be so heard. *Hutchinson* v. *Stephens.* Page 658

PREROGATIVE ADMINISTRATION.

A demurrer to a bill, on the ground that the Plaintiff has not taken out a prerogative administration, cannot be sustained. *Metcalfe* v. *Metcalfe.* 74

PRIORITY.

1. Where one transaction is closely followed by, and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, has been restricted to the same transaction. *Hargreaves* v. *Rothwell.* 154

2. *A.* by deed assigned certain sums represented by a fund in Court to *B.*, in trust to apply the same in payment and discharge of money then due from *A.* to *B.*, and in further payment of all and every the sums of money which *B.* might advance to *A.*; and, subject thereto, in trust for *A.* *A.* died indebted to *B.* in the sum of 3000*l.* due at the date of the assignment, and also largely indebted to the Crown. *A.* was further indebted to a banking firm, of which *B.* was a partner, in a sum which was treated by the partnership as a bad debt, and in respect of which *B.*'s share of the loss amounted to 3914*l.*; and a further sum of 2313*l.* was paid, after the death of *B.*, by his executor to the Crown, upon process being issued against the estate of *B.*, who had been a surety to the Crown for *A.*

The Crown claimed priority as to the whole fund in Court, insisting that the property comprised in the deed consisted of *choses in action*, and that no notice had been given to the trustees of the fund.

Held, that the estate of *B.* was entitled to the benefit of the deed in respect of the sum due at the date of it, and the sum paid by *A.*'s executor, but not to the sum representing *B.*'s share of the loss in the partnership transaction. *Foster* v. *Hargreaves.* Page 283

PRODUCTION OF DOCUMENTS.

A bill of discovery was filed by the directors of an insurance company, in aid of their defence to an action brought by the Defendant to recover the amount of the sum secured by a policy of assurance effected on the life of a person who died shortly after the date

date of the policy. The bill alleged that the declaration, on the basis of which the insurance had been effected, was untrue; and it contained the usual charge, that the Defendant had in his possession documents by which the truth of the matters alleged in the bill would appear. The Defendant admitted that he had in his possession the various documents enumerated in the first schedule to his answer; but he said that, since the death of the person whose life was insured, he had, by reason of certain information, contemplated the bringing his action against the Plaintiffs, if they should dispute their liability to pay the amount of the sum secured by the policy, and that the documents contained information as to evidence which could be procured on the Defendant's behalf, and that the producing the same, or permitting the Plaintiffs to inspect the same, might disclose the names of witnesses intended to be examined, and evidence intended to be given, on behalf of the Defendant, in the action which he had brought against the Plaintiffs. And he submitted, that he ought not to be compelled to produce the said documents, or any of them:

Held, that the Defendant could not protect himself from producing documents communicated by, or to parties who stood in no confidential relation to him, on the ground that their production might disclose the names of witnesses, and evidence intended to be given at the trial; and that he was bound to produce all the documents enumerated in the schedule, except the letters written to and from his solicitors, the statements for the opinions of counsel, and the opinions of counsel thereon. *Storey* v. *Lord George Lennox.* Page 341

PUBLICATION.

The Master has no authority under the 3 & 4 *W.* 4. *c.* 94. *s.* 13. to entertain an application for enlarging publication, in the sense of an application for leave to examine witnesses after the depositions on one side have been delivered out, the words "enlarging publication" in that section being restricted to enlarging the time at which publication is to pass. *Carr* v. *Appleyard.* 725

REDEMPTION.

Where a deposit of a deed was made to secure a debt, and from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mortgagor, on a bill filed by the equitable mortgagee to have the estate sold, is entitled to the usual time to redeem. *Mellor* v. *Woods.* 16

RE-

REGISTRATION.

An assignment of a legacy charged upon land is an assignment of money only, and does not affect the land within the meaning of the registry acts. The registration of such an assignment, therefore, does not postpone a prior unregistered assignment of the same legacy. *Malcolm* v. *Charlesworth.* Page 63

REVIVOR.

A bill of revivor cannot be demurred to for want of a party who was not before the Court at the time of the abatement, although the suit might have been imperfect without such party, for it is not the office of a demurrer to a bill of revivor to correct such imperfection. *Metcalfe* v. *Metcalfe.* 74

REVOCATION.

A testator entered into a contract for the purchase of an estate, by which the vendor agreed to convey the same to the purchaser, his heirs, appointees, or assigns. Subsequently to the contract he made a codicil to his will, by which, after reciting the contract, he devised the purchased estate to his executors and trustees, upon the trusts therein mentioned. He afterwards took a conveyance from the vendor to the usual uses to bar dower:

Held, that the conveyance operated as a revocation of the devise. *Bullin* v. *Fletcher.* Page 369

SATISFACTION.

A. having invested in stock a sum of money, in pursuance of a settlement, by way of portion for one of his daughters, and having given a bond for the payment of a further sum at his decease, entered into an agreement with *B.* to make a provision for his unmarried daughter, on her marriage with *B.*, on a basis of equality with the provision made for his married daughter. A memorandum of the terms of the agreement (in which some variations were afterwards made by the parties) was written at the direction of *A.*, by *A.*'s solicitor, in the presence and with the approbation of *B.*; and *A.* gave instructions to his solicitor to prepare a settlement in conformity with the memorandum, subject to the variations, but he died before such settlement was executed, having made a will, by which he gave a share of the residue of his estate to his married daughter.

B. married the daughter of the testator, and performed his part of the agreement comprised in the memorandum; and on a bill filed by him and his wife, claiming the portion agreed to be settled against the testator's estate, it was held, first, that the memorandum was not a binding agreement within

the statute of frauds; secondly, that the share of the residue, given by the will to the daughter married in the testator's lifetime, was a satisfaction of that part of her portion which was secured by bond. *The Earl of Glengal* v. *Barnard.* Page 769

SECURITY FOR COSTS.

The Court will not compel the next friend of an infant, on the ground of poverty, to give security for costs. *Fellows* v. *Barrett.* 119

SEPARATE ESTATE.

1. A testator devised and bequeathed certain copyhold and leasehold estates to trustees, upon trust to pay the rents and profits to *M. A.* for her life to her separate use, and without power of anticipation, and a testatrix gave certain freehold estates to trustees, in trust for the same *M. A.* for her life, to her separate use, and without power of anticipation.

M. A. was a *feme sole* at the date of the testator's will, and of his death. She was also a *feme sole* at the date of the testatrix's will, but she was married at the death of the testatrix.

M. A. joined with her husband in granting annuities to the Plaintiff, charged upon the estates bequeathed by the testator, and the estates devised by the testatrix.

On the insolvency of the husband, a bill was filed by the Plaintiff to have the annuities paid out of the estates, and, upon motion for an injunction and receiver, the Court granted the motion as to the estates devised by the testator, but not as to those devised by the testatrix, on the ground that the rents of the former estates ought to be secured till the question in the cause could be determined, which could not be decided on an interlocutory motion. *Tullett* v. *Armstrong.* Page 429

2. A female infant, entitled to a legacy of stock, given in trust to be accumulated till she should attain twenty-one, and to be then transferred to her for her separate use, cannot transfer her interest in such legacy by the act of marriage to her husband; and, if married at the time when she attains her majority, she takes an absolute interest in the legacy for her separate use. *Johnson* v. *Johnson.* 648

SETTLEMENT.

By the decree made at the hearing of the original cause, it was referred to the Master to approve of a proper settlement to be made on *S. G.*, a married woman, and for that purpose any of the parties were to be at liberty to lay proposals before the Master.

No question was raised at the hearing as to the children of *S. G.* Before any proposals were laid before the Master, *S. G.* died:

Held, on a supplemental bill filed

filed by the husband against the surviving child of the marriage and her husband, that the decree enured for the benefit of the children. *Groves* v. *Clarke.* Page 132

SHORT CAUSE.

1. A cause, upon the counsel for the Plaintiff undertaking to certify that it was proper to be heard as a short cause, was directed to be put into the next paper of short causes without the concurrence of the Defendant's solicitor.

Inexpediency of the rule requiring such concurrence, where it is withheld merely for the purpose of delaying the taking of accounts in the Master's office. *Mountford* v. *Cooper.* 464

2. A special application on the part of the Defendant to have a cause advanced and heard as a short cause, will be granted, unless the counsel for the Plaintiff will undertake to say that the cause is not a proper one to be so heard. *Hutchinson* v. *Stephens.* 658

SOLICITOR.

1. Where one transaction is closely followed by, and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction, by which the rule, that notice to the solicitor is notice to the client, has been restricted to the same transaction. *Hargreaves* v. *Rothwell.* Page 154

SPECIAL CIRCUMSTANCES.

The Master is not at liberty to state special circumstances, unless authorised by the Court; and where in a creditor's suit the decree directed the usual accounts, and the Master found the amount of the debt appearing to be due to the Plaintiff, but stated, without the authority of the Court, special circumstances, not supported by evidence, raising a doubt as to the amount of the apportionment to which the Plaintiff would be entitled out of the intestate's estate, which was insolvent, upon the debt so found due, the Court refused to enter into the consideration of such special circumstances. *Semble,* that the decision would have been the same, had the special circumstances been supported by evidence before the Master. *Gayler* v. *Fitzjohn.* 469

SPECIFIC LEGACY.

A testator gave to his wife, *F. H.*, the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being

applied for that purpose if necessary. On the death of his wife he gave to his daughter *J. H.* 200*l.* stock, 3 per cent. reduced annuities, and to two other persons 50*l.*, 3 per cent. reduced annuities, respectively, and to his son the residue of his property, after paying those legacies. And he appointed two persons his executors and trustees.

At the date of his will the testator had 700*l.* 3 per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage:

Held, that the gift to *F. H.* of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock, but that the other legacies were general, and that *F. H.* took only a life interest in the testator's residuary estate. *Hayes* v. *Hayes.* Page 97

SPECIFIC PERFORMANCE.

1. Insolvency is a ground upon which the Court will refuse specific performance of an agreement to grant a lease, but there must be proof of general insolvency, and a particular default in the payment of rent to the landlord of the premises last occupied by the person contracting for the lease, will not disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility. *Neale* v. *Mackenzie.* 473

2. *A.* made an equitable mortgage of certain premises to *B.*, and he afterwards entered into an agreement to grant a lease of the premises to *C.*, who had notice of the prior charge. *A.* became bankrupt before the lease was executed, and on the petition of *B.* an order in bankruptcy was made, under which the premises were sold, and *B.* became the purchaser, and retained the amount of his equitable mortgage out of the purchase-money:

Held, on a bill filed by *C.* for specific performance of the agreement, that *B.* having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement. *Smith* v. *Phillips.* Page 694

3. *A.* having invested in stock a sum of money, in pursuance of a settlement, by way of portion for one of his daughters, and having given a bond for the payment of a further sum at his decease, entered into an agreement with *B.* to make a provision for his unmarried daughter, on her marriage with *B.*, on a basis of equality with the provision made for his married daughter. A memorandum of the terms of the agreement (in which some variations were afterwards made by the parties) was written at the direction of *A.*, by *A.*'s solicitor, in the presence and with the approbation of *B.*; and *A.* gave instructions to his solicitor to prepare a settlement

ment in conformity with the memorandum, subject to the variations, but he died before such settlement was executed, having made a will, by which he gave a share of the residue of his estate to his married daughter.

B. married the daughter of the testator, and performed his part of the agreement comprised in the memorandum; and on a bill filed by him and his wife, claiming the portion agreed to be settled against the testator's estate, it was held, first, that the memorandum was not a binding agreement within the statute of frauds; secondly, that the share of the residue, given by the will to the daughter married in the testator's lifetime, was a satisfaction of that part of her portion which was secured by bond. *The Earl of Glengal* v. *Barnard.* Page 769

See ASSETS 2.

STATUTES, CONSTRUCTION OF.

1. 1 *W.* 4. *c.* 47. *s.* 11. *Radcliffe* v. *Eccles.* 130
2. 46 *G.* 3. *c.* 135. *s.* 1. *De Tastet* v. *Le Tavernier.* 161
3. 1 *W.* 4. *c.* 60. *s.* 8. *Ex parte Whitton.* 278
4. 4 & 5 *W.* 4. *c.* 23. *s.* 2. *Ibid.*
5. 1 *W.* 4. *c.* 60. *Turner* v. *Edgell.* 502
6. 5 & 6 *W.* 4. *c.* 76. *The Attorney-General* v. *Aspinall.* 513
7. 3 & 4 *W.* 4. *c.* 94. *s.* 13. *Carr* v. *Appleyard.* 725
8. 2 & 3 *W.* 4. *c.* 115. *Attorney-General* v. *Todd.* Page 803

TENANT IN TAIL.

An infant tenant in tail may be ordered to convey under the 1 *W.* 4. *c.* 47. *s.* 11. *Radcliffe* v. *Eccles.* 130

TITLE.

Where an estate was sold under a decree of the Court, and one of the conditions of sale was, that the purchaser pay the purchase-money into Court on a given day, at his own expense, it was held, that the purchaser was entitled to the costs of a reference as to the title reported good by the Master. *Camden* v. *Benson.* 671

TORT.

Demurrer to a bill for discovery in aid of an action brought by the Plaintiff to recover damages for an assault and false imprisonment, allowed, the whole object of the bill being to obtain a discovery of matters which, if established, would have subjected the Defendant to penal consequences.

The whole object of a bill of discovery being criminatory, a general demurrer does not cover too much, because some of the interrogatories, separately considered, may relate to matters not directly criminatory:

Semble, that a bill of discovery in aid of an action for a mere personal *tort* cannot be sustained. *Glynn* v. *Houston.* Page 329

TRUST.

A sum of 2000*l.* was by the direction of *H. O.* carried by her bankers to an account in the joint names of herself, as trustee for the Plaintiffs, and the Plaintiffs; the bankers gave a promissory note for the amount, payable in fourteen days with interest at 2½ per cent. to *H. O.*, trustee for the persons therein named. After the death of *H. O.*, her executors received from the bankers the sum secured by the promissory note:

Held, that the transaction amounted to a complete declaration of trust, and that the executor was a trustee for the Plaintiffs in whose favour the trust was declared. *Wheatley* v. *Purr.* 551

TRUSTEE.

1. Where an estate is devised, without any limitation of the quantity of interest, to trustees in trust for a limited purpose, with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees will cease on the satisfaction of the limited purpose, and will vest in the persons beneficially entitled in remainder. *Heardson* v. *Williamson.* 33

2. *A.* having a life interest in premises vested in trustees who had a power of leasing, agreed to grant a lease for twenty-one years to *B.* The trustees refused to grant a lease to *B.*, on the ground that he was in insolvent circumstances, and that the grant of such lease would be a breach of trust against their *cestuis que trust.*

The Court being of opinion that *B.* was entitled to specific performance, and that the trustees had given *A.* some authority to act, ordered the trustees to execute a lease to *B.* to the extent of *A.*'s interest. *Neale* v. *Mackenzie.* Page 475

3. The Court will not allow costs to a trustee who, after having acted declines to perform the trusts reposed in him, and thereby renders a suit for the appointment of a new trustee necessary. *Howard* v. *Rhodes.* 581

4. The trustees of a marriage settlement being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant for life, in repeatedly charging the trust estates and funds with annuities and other incumbrances, filed a bill to be discharged from the trusts, and for the appointment of new trustees under the direction of the Court.

The Court granted the relief sought by the bill, and ordered the costs to be paid out of the interest of the tenant for life. *Coventry* v. *Coventry.* 758

VENDOR AND PURCHASER.

1. Mortgagees, with notice of a specific charge for payment of debts upon devised estates, were held, notwithstanding releases of the executors to the devisees, (such devisees being themselves two of the executors, and the releases not shewing that the charge had been raised and paid,) to be bound to see to the application of the mortgage money. *Braithwaite* v. *Britain.* Page 206

2. A testator entered into a contract for the purchase of an estate, by which the vendor agreed to convey the same to the purchaser, his heirs, appointees, or assigns. Subsequently to the contract he made a codicil to his will, by which, after reciting the contract, he devised the purchased estate to his executors and trustees, upon the trusts therein mentioned. He afterwards took a conveyance from the vendor to the usual uses to bar dower:

Held that, the conveyance operated as a revocation of the devise. *Bullin* v. *Fletcher.* 369

3. Where an estate was sold under a decree of the Court, and one of the conditions of sale was, that the purchaser pay the purchase-money into Court on a given day, at his own expense; it was held, that the purchaser was entitled to the costs of a reference as to the title reported good by the Master. *Camden* v. *Benson.* 671

4. A testator, after commencing his will with words amounting to a charge of his real estate with the payment of his debts, devised an advowson to trustees upon trust to present his younger son to the living when vacant, and subject thereto in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his residuary real estate upon certain trusts to other trustees, and appointed three executors (who proved his will) one of whom was his younger son, and another one of the trustees of the advowson.

The personal estate being insufficient for the payment of his debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson, before any vacancy had occurred in the living.

In a suit for specific performance by the trustees of the advowson and executors, against the purchaser; it was held, that the charge being in effect a devise of the real estate in trust for the payment of debts, a good title could be made by the plaintiffs, without the institution of a suit to ascertain the deficiency of the personal estate, and that the purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money. *Shaw* v. *Borrer.* Page 559

5. In

5. In suits for specific performance between vendor and purchaser, every thing connected with the title may be the subject of the usual reference upon motion as to the vendor's title, and may be added by way of inquiry to that reference; but the Court will not allow any inquiry to be added as to matters which have no reference to the title, and which are not admitted by the answer. *Bennett* v. *Rees.* Page 405

6. *E. D.* was beneficially entitled, under his marriage settlement, to an estate for his life, and to the ultimate reversion in fee in default of issue male; and the trustees of the settlement had a power to sell at the request and by the direction of the tenant for life. There was issue of the marriage.

E. D. acting as absolute owner, entered into a contract by correspondence to sell the estate to *T.*, and the trustees afterwards refused to concur in the sale:

Held, on a bill for specific performance, first, that there was a binding contract between the vendor and purchaser, and that the vendor was bound to perform it, if he was able; secondly, that the vendor ought not to be decreed to request or direct the trustees to execute a conveyance, unless the trustees ought to comply with the request; thirdly, that the trustees had a discretion, under the power of sale, which the Court had no power or jurisdiction to control; and lastly, that the purchaser was not entitled, in such a case, to have the contract performed to the extent of the vendor's interest, by a conveyance of his life estate and his ultimate reversion.

Principles upon which the Court proceeds in determining whether the purchaser is entitled to a partial performance of the contract, with compensation for the deficiency, where the vendor has only a limited interest in the estate contracted to be sold, and is, therefore, incapable of performing the whole contract. *Thomas* v. *Dering.* Page 729

WILL.

1. A testatrix gave the residue of her property to *A.*, and by a codicil, reciting that gift, and that, as life was uncertain, *A.* might be removed before her, she in such case appointed *B.* and *C.* her residuary legatees. The testatrix made a second codicil, as follows:—"As the death of Mrs. *W.* (the mother of *B.* and *C.*) has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to Mrs. *H.*:" Held, that *A.* was entitled to the residue. *Vaughan* v. *Foakes.* 58

2. A testatrix made the following bequest:—"I give to *A. A.* the sum of 400*l.*, to be paid at and after my decease, and vested in the *S.* took a vested estate tail in the public

public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease at, before, or after the said period, the sum so bequeathed to be divided between *E. M.* and *A. M.*" *A. A.* took a life-interest only in the legacy. *Miles* v. *Clark.* Page 92

3. A testator gave to his wife, *F. H.*, the interest of all his property in the public funds during her life, the principal being placed in the names of the under-mentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose if necessary. On the death of his wife he gave to his daughter *J. H.* 200*l.* stock, 3 per cent. reduced annuities, and to two other persons 50*l.*, 3 per cent. reduced annuities, respectively, and to his son the residue of his property, after paying those legacies. And he appointed two persons his executors and trustees.

At the date of his will the testator had 700*l.*, 3 per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage:

Held, that the gift to *F. H.* of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock, but that the other legacies were general, and that *F. H.* took only a life interest in the testator's residuary estate. *Hayes* v. *Hayes.* Page 97

4. The word "family," admits of a variety of applications, and the construction to be put upon it in a particular will must depend upon the intention of the testator to be collected from the whole context of the will.

Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust that at his wife's decease the whole of it, as well freehold as personal, should be equally divided among his children; it was held, that the testator, in the words "my family," intended to comprise his wife; and as to the testator's property devised after his wife's decease to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication, as well in the real as in the personal estate.

As to the effect of a devise to the heir and another person, or to the heir and other persons on the death of *A.* where there is no explanatory context, *quære.* *Blackbull* v. *Bull.* 176

5. The testator directed the residue of his property to be invested in land, and given to *S.*, who was "not to be of age to receive this until he attained his twenty-fifth year,

year, and to be entitled to him and his heirs male:" Held, that land, subject to be devested if he should not attain twenty-five; and that the rents and profits were applicable to his benefit during his minority. *Snow* v. *Poulden.* Page 186

6. Where introductory words in a will directing payment of all the testator's just debts were followed by specific devises to two of the executors; it was held, upon the whole context of the will, that the testator had not charged his real estate generally with the payment of debts. *Braithwaite* v. *Britain.* 206

7. Bequest of residue to *A.* for life, and after the death of *A.* and *B.* to *G. B.* and *H. B.*, to be equally divided between them, share and share alike, or to the survivor or survivors of them.

G. B. and *H. B.* both died in the lifetime of the surviving tenant for life: Held, that their representatives were respectively entitled to a moiety of the residue on the death of the surviving tenant for life. *Balk* v. *Slack.* 238

8. The testator gave all his lands, tenements, and hereditaments, and the residue of his personal estate, to trustees, &c., to the use of his grandson *H. T.* for life, and after his decease in trust for the child and children of *H. T.*, at his or their ages of twenty-one, as tenants in common; but in case *H. T.* should happen to die without leaving any lawful issue of his body living at the time of his decease, then over.

H. T. had two children, a son, who died in his infancy, and a daughter who attained twenty-one, but died intestate in the lifetime of *H. T.*, leaving children: Held, that in the events which happened, the personal estate belonged to the personal representative of the daughter of *H. T.*, and that the real estate vested in her heir-at-law. *Hutchinson* v. *Stephens.* Page 243

9. *Primâ facie*, a testator must be presumed to intend that all his legacies should be equally paid, and the *onus* is upon those who contend for a priority to shew that the testator meant to give a preference to a particular legatee.

A testator gave 1000*l.* to trustees, upon trust to pay the interest to his wife during her life, and after her decease he declared his will to be that the 1000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his will; and he gave a legacy of 500*l.* in trust for *N. M.* and his wife, in nearly the same words: Held, that a priority was given to these two legacies. *Brown* v. *Brown.* 275

10. Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was

was tendered for the purpose of shewing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property, in which she had only a life-interest, to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible. *Clementson* v. *Gandy*. Page 309

11. A testator gave a legacy of 400*l*. to his wife, and after her decease to *G. W.*; and if *G. W.* should die in her lifetime, to such person or persons as he should by will appoint; and in default of appointment, after the death of his wife, to the executors and administrators of *W. G.* absolutely. *W. G.* died, having made a will by which he appointed an executor, but made no appointment of the legacy. The executor did not take a beneficial interest in the legacy. *Wood* v. *Cox*. . . 317

12. A testatrix bequeathed all her personal property to *C.*, whom she appointed one of her executors, to his own use and benefit for ever, trusting and wholly confiding in his honour that he would act in strict conformity with her wishes. On the same day on which she made her will, she executed a testamentary paper, by which she gave several annuities and legacies, and among others, a legacy to the person who was her sole next of kin:

Held, that *C.* took no beneficial interest, but was a trustee of the residue for the next of kin. *Storks* v. *Dodsley*. Page 305

13. The testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one, and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one; but if the whole of the said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned:

Held, that the grandchildren were entitled to the interest during their minority. *Boddy* v. *Dawes*. 362

14. A testator entered into a contract for the purchase of an estate, by which the vendor agreed to convey the same to the purchaser, his heirs, appointees, or assigns. Subsequently to the contract he made a codicil to his will, by which, after reciting the contract, he devised the purchased estate to his executors and trustees upon the trusts therein mentioned. He afterwards took a conveyance from the vendor to the usual uses to bar dower:

Held,

Held, that the conveyance operated as a revocation of the devise. *Bullin* v. *Fletcher.* Page 369

15. A testator gave to *M. S.* 50,000*l.* 3 per cent. consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate:

Held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the will from the payment of legacy duty.

The testator devised and bequeathed the residue of his estate and effects real and personal to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to *M. S.* for her life, and after her decease to pay and transfer such residue in equal moieties to the persons therein mentioned:

Held, that the tenant for life was entitled to the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as should elapse before the conversion of the residue according to the direction of the will. *Douglas* v. *Congreve.* 410

16. The testator commenced his will with the words: "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid." He then made several devises, and he gave to *J. G.* a small quantity of plate, together with the rents and profits of his freehold and leasehold premises due and accruing up to the quarter day next after his decease; which rents and profits he charged with the payment of his said debts, funeral expenses, and the charges of proving his will:

Held, that the testator had not charged his real estates generally with the payment of his debts. *Palmer* v. *Graves.* Page 545

17. A testator by his will gave 3000*l.* to his brother *B.* for his life, with remainder to his wife for her life, remainder to his children; and he gave 6000*l.* to his sister *S.* for her life, with remainder to her husband for his life, remainder to her children: and after giving 10*l.* a year to each of his said servants, for their lives, he gave his real estate, and the residue of his personal estate and effects to his sister *H.*

By a codicil, described as a codicil to his will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with limitations after his decease, for the benefit of his wife and children; and his sister *S.* was to have an equal share with his sister *H.*

By a second codicil he left to his

his two maid servants 10*l.* a year each, for their lives.

The testator's sister *S.* survived her husband, and died leaving two children:

Held, that *S.* was entitled, under the first codicil, to one-third share of the testator's personal estate, subject to the limitations declared by the testator with respect to the legacy of 6000*l.* which had been given by the will. *Cookson* v. *Hancock.* Page 816

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